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Report of the International Law Commission on the work of its fifty-second session (2000)

Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-fifth session prepared by the Secretariat

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Introduction

1. At its fifty-fifth session, the General Assembly, on the recommendation of the General Committee, decided at its 9th plenary meeting, on 11 September 2000, to include in the agenda of the session the item entitled "Report of the International Law Commission on the work of its fifty-second session" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 14th to 24th and 30th meetings, on 23, 24 and 27 October and 1, 2, 3 and 15 November 2000. The Chairman of the International Law Commission at its fifty-second session introduced the report of the Commission: chapters I to IV at the 14th meeting, on 23 October; chapters V and VI at the 18th meeting, on 27 October; and chapters VII to IX at the 22nd meeting, on 1 November. At its 30th meeting, on 15 November, the Sixth Committee adopted draft resolution A/C.6/55/L.6 and Corr.1, entitled "Report of the International Law Commission on the work of its fifty-second session". The draft resolution was adopted by the General Assembly at its 84th plenary meeting, on 12 December 2000, as resolution 55/152.

3. By paragraph 21 of resolution 55/152, the General Assembly requested the Secretary-General to prepare and distribute a topical summary of the debate held on the report of the Commission at the fifty-fifth session of the Assembly. In compliance with that request, the Secretariat has prepared the present document containing the topical summary of the debate.

4. The document consists of six sections: A. State responsibility; B. Diplomatic protection; C. Unilateral acts of States; D. Reservations to treaties; E. International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities); and F. Other decisions and conclusions of the Commission.

Topical summary

A. State responsibility

1. General remarks

5. There was general agreement concerning the importance of the Commission's work on the topic of State responsibility, which was described as a monumental project, the most important work of codification the Commission had ever undertaken as well as a landmark in the codification of international law which could become an important element of the international legal system. It was remarked that the codification of the topic, which was important for harmonious international relations and constituted one of the fundamental areas of contemporary international law, represented a crucial alternative to the use of force as a means of settling disputes between States and the best way of maintaining and consolidating international peace and security.

6. Several speakers expressed appreciation for the Special Rapporteur's contribution to the Commission's work on the topic. His latest report was said to provide a clear and extensive analysis of the topic which was itself an important contribution to international legal scholarship in the field. There was support for the Special Rapporteur's new approach to the topic. His proposed revision of the draft articles was welcomed as being more concise and reflecting more modern norms than the previous version.

7. While appreciating the significant progress that had been achieved in recent years, the Commission was urged to complete its work on the State responsibility topic, which had been on its agenda for nearly five decades, by concluding the second reading by the end of its next session, in 2001, to avoid any further delay following the inevitable changes in the composition of the Commission after its election later that year. However, the view was also expressed that the Commission should not rush into adopting a set of rules which might seem inappropriate in a few years' time since the outstanding issues were matters which had not been settled in general international law, which was undergoing rapid change.

(a) The draft articles provisionally adopted by the Drafting Committee

8. The Commission's decision to include in its report the draft articles provisionally adopted by the Drafting Committee for their consideration by the Sixth Committee before adoption by the Commission was welcomed as a means of facilitating the timely completion of work on the text. The Sixth Committee's consideration of the topic concentrated on those draft articles.[1]

9. It was felt that many improvements in the draft articles reflected comments made in the Committee. Emphasis was placed on the importance of considering the views of Governments and the practice evidenced by their replies, particularly in resolving outstanding issues, given the importance of the topic to the international community as a whole.

10. A number of delegations noted with satisfaction that the new draft articles were generally simpler, clearer, streamlined, more logical, more consistent, balanced, technically sound, realistic and thus constituted a major improvement on those adopted on first reading in 1996. It was remarked that it was now clear that the draft articles were intended to regulate the relations among three parties, namely, responsible States, injured States and States other than injured States. It was also remarked that the elimination of references to certain remote possibilities made the text more realistic, and therefore more acceptable and more likely to influence policy decisions and State practice. At the same time, it was felt that time was required to determine the specific impact on international relations of a number of provisions, such as those dealing with countermeasures, particularly collective countermeasures; serious breaches of obligations to the international community as a whole; and the definition of an injured State. In contrast, a view was expressed that the Commission did not yet have a comprehensible and understandable set of draft articles on State responsibility and that the inclusion of large segments of the draft articles, such as those on countermeasures and dispute settlement, was still questionable. It was suggested that a general, simple and clear articulation would be preferable to a detailed elaboration that might give rise to controversy.

[1] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), chap. IV, appendix.

(i) Scope

11. As regards the scope of the draft articles, there was support for its proposed expansion to cover all cases of State responsibility. There was also support for the revised text avoiding controversial issues that were not necessarily within its scope and instead focusing on the consequences of internationally wrongful acts, which was problematic and confusing in the first reading. It was felt that, as a matter of principle, at the current stage the draft articles should be limited to responsibility between States, a sufficiently complex matter, and attribute to States alone the power to invoke responsibility, while excluding international organizations, other institutions or individuals from the legal regime they instituted. At a later stage, once that system had demonstrated its efficacy, it might be possible to codify other forms of invocation of State responsibility. It was suggested that in finalizing the draft articles the Commission should draw an appropriate distinction between State responsibility as such and liability for transboundary damage from hazardous activities, for which the operator of the activity was primarily responsible.

(ii) Definitions

12. Regarding definitions, it was suggested that, in accordance with the principles of the Charter of the United Nations, it was necessary to come up with a definition of the responsibility of States for their internationally wrongful acts based on the Vienna Convention on the Law of Treaties. It was also suggested that a precise definition was still required for the concepts of State crimes, unilateral coercive acts and countermeasures by the injured State against the responsible State in order to achieve a proper balance of interests between those States. However, it was also felt that the role of the Commission in the codification of international law provided for in the Charter of the United Nations did not require that concepts should be introduced for codification prematurely.

(iii) Structure

13. Several delegations expressed support for the new structure of the draft articles. However, a view was expressed that the architecture of Roman law might be helpful in clarifying the structure of the draft articles with respect to substantive rules, dealing with the substantive rights of subjects of law and their conduct in relation to one another, or procedural rules, intended

to ensure the application of the substantive rules. It was suggested that the substantive rules, which need not be numerous, could be rationalized around the principle of *pacta sunt servanda* and, as a minimum, should stipulate that a wrongful act must cease and the damage caused by the act must be repaired. Procedural rules would have to deal with two key questions: who was authorized to decide that an international obligation had been breached and who was authorized to invoke State responsibility in the case of a breach?

(b) Primary versus secondary rules

14. Noting that determining secondary responsibility required identifying which norms of primary responsibility had been violated, it was remarked that among the more controversial questions was whether or not to include articles referring to the primary responsibility of a State or to limit the draft articles to situations related to secondary responsibility. The view was expressed that the adoption of a distinction between primary and secondary rules had made it possible to avoid a whole range of theoretical and practical obstacles. In that regard, support was expressed for the draft articles not dealing with the issue of identification of the responsible State, which was covered by primary rules. There was also support for the deletion of some draft articles concerning primary rules of international law as an improvement in the text and for the Special Rapporteur's decision not to dwell on the problem of defining primary rules, with the hope being expressed that the Commission would confine itself to the codification of secondary rules.

(c) Codification versus progressive development

15. The view was expressed that the draft articles achieved a welcome balance between customary law and innovative elements aimed at promoting the progressive development of international law. The draft articles were described as a suitable codification of customary law on the subject, while including innovative elements aimed at ensuring that the regime governing State responsibility was fair in the light of new realities in international relations. At the same time, while welcoming the enhanced clarity of the draft articles, it was queried whether they were not too innovative. It was suggested that an assessment of the changes made in the draft articles to reflect the progressive development of international law would depend on their final form.

16. Many improvements in the draft articles were said to reflect an attempt to adhere more closely to existing customary law and the actual practice of States. Focusing on codification rather than progressive development was considered to be a commendable approach because State responsibility was part of the infrastructure of international law and States would be reluctant to support the new rules unless they reflected existing customary law. In agreeing that the draft articles should reflect customary international law, the view was expressed that despite significant improvements in the text, certain provisions continued to deviate from customary international law and could be better aligned with international practice, namely, those relating to countermeasures, serious breaches of essential obligations to the international community, and the definition of an "injured State". It was suggested that it was not advisable to adopt an innovative and revolutionary approach in a technically complex and politically delicate sphere and that further work was required to achieve a text that was representative of the practice of States.

17. On the other hand, the view was expressed that the Commission should not confine itself to codifying existing international norms, but must strive to contribute to the progressive development of international law, particularly on a matter as important as State responsibility. Caution was advised to avoid returning to the traditional conventional approach at the expense of progressive notions imported into the law largely as a result of the impact of newly independent States.

(d) Obligations *erga omnes*

18. There were various remarks concerning the consideration of obligations *erga omnes* in the draft articles. While attention was drawn to the decision of the International Court of Justice in the Barcelona Traction case as recognition of the existence of such obligations, several delegations felt that these obligations and the way in which they were addressed in Part Two and Part Two bis of the draft articles required further careful consideration. The view was expressed that while the draft articles emphasized the concept of respect for obligations *erga omnes* and provided for the concept's implementation, first, through the invocation of State responsibility and,

second, through the regime of countermeasures, those obligations remained ill defined in international law. It was considered necessary to codify those obligations so as to avoid problems relating to both their definition and the capacity to invoke responsibility. It was suggested that reference should also be made to the other side of the coin of obligations *erga omnes*, namely, the concept of *actio popularis* by States: a consequence of breaching obligations of that kind was that responsibility could be invoked by any State member of the international community, whether or not it was a direct victim of the wrongful act.

(e) Dispute settlement

19. Support was expressed for the decision to set aside the provisions on dispute settlement which had been adopted, on first reading, as Part Three and annexes I and II. It was observed that there was no need for a special regulatory mechanism in disputes raising questions of responsibility, which could be resolved under general international law. It was also pointed out that, apart from mandatory dispute settlement procedures contained in binding legal instruments, the consent of States remained the crucial factor for the use of any means of dispute settlement.

20. According to another view, while the provisions adopted on first reading needed to be reviewed, in the light of the fact that Article 33 of the Charter of the United Nations gave parties to a dispute a range of means of peaceful settlement, some provisions on dispute settlement were still required. The elaboration of an effective dispute settlement mechanism was considered necessary for the proper functioning of a legal regime on State responsibility, since without it the text would be incomplete and the efficacy and application of the principle of responsibility would be weakened. Support was thus expressed for the inclusion of a compulsory third-party settlement procedure, and it was suggested that the system to be devised should include resort to the International Court of Justice to hear disputes relating to draft articles 41 and 42, once other dispute settlement procedures had been exhausted. It was also suggested that the Commission should submit a revised text of Part Three as part of a complete text of the draft articles for second reading.

21. Others pointed out that the decision to include a section on the settlement of disputes was dependent on the eventual form of the draft articles. At the same time, the view was expressed that a set of dispute settlement rules would have merit even if the text did not take the form of a legally binding convention.

(f) Final form of the draft articles

22. On the question of the final form of the draft articles, some speakers advocated the adoption of an international convention on State responsibility, alongside such major codification projects as the Vienna Convention on the Law of Treaties, the United Nations Convention on the Law of the Sea and the Rome Statute of the International Criminal Court. The view was expressed that a convention would have greater regulatory force and legal certainty, and would be more in keeping with the Commission's mandate to develop normative instruments rather than indicative guidelines. Only a binding instrument could offer the guarantees and certainty necessary to enable injured States to obtain reparation. Moreover, the adoption of a declaration might cause the rules established in the draft articles, some of which were quite innovative, to be cited as principles without prior implementation in State practice. It was also pointed out that a legally binding instrument, even without a wide participation initially, was bound to have far more impact than a declaration.

23. Others suggested that the aim should not be the adoption of a multilateral convention. The view was expressed that a binding instrument was neither realistic nor appropriate. It was pointed out that the adoption of an international treaty would involve a protracted and difficult set of negotiations, and could result in an instrument that would take a long time to enter into force. Furthermore, since the text dealt with secondary rules of international law, the treaty form did not seem appropriate. Support was thus expressed for the adoption of a non-binding instrument such as a declaration or code. In terms of one proposal, the General Assembly could take note of the articles on State responsibility as a restatement of international law, without redrafting the articles.

24. Still others, while favouring the eventual adoption of a multilateral treaty, proposed a phased approach whereby the Commission's product would be adopted in the form of a non-binding instrument, such as a declaration of principles, which would constitute the basis for the eventual codification of the topic in the form of a treaty. Such an approach would also ensure that the text would not be abandoned altogether

as a result of the obstacles inherent in the negotiation of a binding instrument.

2. Part One. The internationally wrongful act of a State

25. Some delegations expressed support for the amendments to Part One, which in their view presented no major difficulties. There was support, in particular, for: the streamlining of Part One concerning the issues of attribution to the State of what constituted a violation of an international obligation and of the circumstances precluding wrongfulness; its more classical architecture; and the clarification that internationally wrongful acts of a State formed a single category. However, the view was also expressed that Part One was too general.

Title

26. A suggestion was made to amend the title to "Acts precipitating State responsibility".

Chapter I
General principles

Article 2 [3][2]
Elements of an internationally wrongful act of a State

27. It was suggested that draft article 2 would be improved by inserting, between commas, after the word "when" the phrase "none of the circumstances excluding wrongfulness according to chapter V of this Part are present".

Article 3 [4]
Characterization of an act of a State as internationally wrongful

28. The view was expressed that former article 42, paragraph 4, should be deleted given the general provision on the irrelevancy of internal law contained in new draft article 3 which, as a general principle applicable to the whole draft articles, should be placed in Part One, chapter I; and that draft article 3 should be extended to make international law universally applicable to all situations involving State responsibility by adding a new paragraph 2 concerning the general irrelevancy of internal law.

Title

29. It was suggested that the title should be amended to read "Law applicable for characterization of an act of a State as internationally wrongful", or simply "The applicable law".

Chapter II
The act of the State under international law

Article 4 [5]
Attribution to the State of the conduct of its organs

30. It was suggested that article 4 could be streamlined.

Article 9 [10]
Attribution to the State of the conduct of organs acting outside their authority or contrary to instructions

31. It was suggested that article 9 could be streamlined.

Article 10 [14, 15]
Conduct of an insurrectional or other movement

32. Querying the apparently open-ended link established in draft article 10 between the conduct of an insurrectional movement and the responsibility of a new State which emerged from it, it was considered useful to specify the degree of proximity or the time frame required for the conduct of an insurrectional movement that became the new Government of a State to be considered an act of that State.

33. It was also suggested that article 14, paragraphs 1 and 2, adopted on first reading should be retained; and that the words "or other" should be inserted after "insurrectional" in new article 10, paragraph 1, which did not deal with movements other than insurrectional movements. Noting that article 10, paragraph 2, seemed to imply that such a movement could establish a new State throughout the territory of the former State, it was also considered unreasonable to suppose that it

[2] The numbers in square brackets correspond to the numbers of the articles adopted on first reading.

could acquire jurisdiction over a part but not the whole of the State.

Chapter III
Breach of an international obligation

Article 13 [18]
International obligation in force for the State

34. The view was expressed that article 13 was of an intertemporal nature aimed at excluding any retroactive application of the provisions and therefore did not duplicate article 12.

Article 15 [25]
Breach consisting of a composite act

35. It was suggested that paragraph 1 should be clarified by replacing the words "defined in aggregate as wrongful" by the words "capable of being regarded in aggregate as wrongful".

Chapter IV
Responsibility of a State in respect of the act of another State

36. It was considered important to emphasize the need for consensus on certain concepts or definitions appearing in chapter IV, without which the draft articles would lack authority.

37. The view was also expressed that chapter IV did not cover all the subject matter indicated by its title, since there was no rule on the effects of a guarantee given by a State for the international obligations of another State, and that the chapter should be deleted because it contained essentially primary rules.

Article 16 [27]
Aid or assistance in the commission of an internationally wrongful act

Article 17 [28]
Direction and control exercised over the commission of an internationally wrongful act

Article 18 [28]
Coercion of another State

38. While support was expressed for the general thrust of articles 16, 17 and 18, it was considered unnecessary that the State which assisted, directed or coerced another State should have done so with knowledge of the circumstances of the act in order to incur responsibility; it should be sufficient that the act in question would be internationally wrongful if committed by that State. It was also felt that knowledge of the circumstances was in that case implicit, and to create the express condition in the text set up two different but cumulative criteria that would make it harder to attribute responsibility. Introducing the qualification of "knowledge of the circumstances" in articles 16 to 18 was also questioned in view of the fact that it was not specified as a requirement in article 2 concerning the elements of an internationally wrongful act.

39. Reservations were also expressed concerning articles 16, 17 and 18, which were described as inconsistent with the requirements of justice, as follows: Draft article 16 (b) implied that a State which facilitated or assisted in the breach of an obligation by another State would not be committing a wrongful act if the obligation in question was not binding upon it and effectively sanctioned assistance to wrongdoers in certain cases. It was suggested that opting for the wording of draft article 2 adopted on first reading might avoid that inference. Draft article 17 implied that a State could direct and control another State in the commission of a wrongful act, as long as that act was not wrongful for itself. Draft article 18 would seem to allow a State to coerce another State to commit an act which, although not wrongful for the coerced State, might well be wrongful for the coercing State. It was felt that, in most cases, coercion of another State would in itself be unlawful, since it would normally involve unwarranted interference with the internal or external affairs of that State, or the implied threat of the use of force.

Chapter V
Circumstances precluding wrongfulness

40. Agreement was expressed with the Commission's views concerning chapter V. The provisions of chapter V were described as being related to the general principles of law, since they were well represented in national law.

Title

41. The view was expressed that the title should be amended to read "Circumstances precluding responsibility" since the lawfulness or otherwise of acts was determined primarily by other rules of international treaty law or customary law, before the rules on responsibility came into play. Only attenuating circumstances could enable the actor to escape responsibility for an act which would otherwise be wrongful.

Article 20 [29]
Consent

42. There were regrets that the exception regarding the ineffectiveness of consent in cases of peremptory obligations had not been retained in article 20 because of the importance of this principle of international law, which needed to be clarified, not eroded or ignored. It was suggested that the issue of consent, which must in any case be freely given, should be approached with caution, since the very essence of the notion of *jus cogens* was that it could not be derogated from by agreement between the parties, because that would be incompatible with international public order.

Article 21
Compliance with peremptory norms

43. It was suggested that article 21 must be interpreted in the light of the need to define more clearly peremptory norms of international law which protected fundamental humanitarian values.

44. It was also suggested that draft article 21 should refer to decisions taken by the Security Council under Chapter VII of the Charter of the United Nations.

Article 22 [34]
Self-defence

45. While support was expressed for the draft article, it was suggested that it could be amended to reflect the possibility of a State invoking its right of self-defence under customary international law.

Article 23 [30]
Countermeasures in respect of an internationally wrongful act

46. Support was expressed for the inclusion of such an article recognizing the taking of lawful countermeasures as a circumstance precluding wrongfulness. It was observed that countermeasures played an important role in inducing compliance with international law, and their validity had been recognized by international tribunals. Several speakers welcomed the amendments made to the provision.

Article 26 [33]
State of necessity

47. While accepting the treatment of necessity in draft article 26, the view was expressed that its scope must be very limited to avoid abuse; the strict conditions, especially in paragraph 2 (a), were therefore welcome.

48. It was suggested that it would be useful to clarify the phrase "essential interest", as compared with "fundamental interests" in draft article 41, and the nature and scope of the interests in question.

Article 27 [35]
Consequences of invoking a circumstance precluding wrongfulness

49. The view was expressed that article 27 was problematic because it stated that the invocation of a circumstance precluding wrongfulness was "without prejudice to the question of compensation for any material harm or loss caused by the act in question", although it should not be applicable to certain circumstances precluding wrongfulness such as consent, compliance with peremptory norms, self-defence, countermeasures and force majeure. Agreement was expressed with the Special Rapporteur's view in his second report that the question of compensation arose only in cases of distress and necessity. In such cases, it was considered more accurate to refer to exemption from responsibility since otherwise it was unclear how the question of compensation could arise.

3. Part Two. Consent of international responsibility of a State

50. There was support for reformulating the draft articles from the perspective of the State incurring responsibility and for reorganizing Part Two to clarify the distinction between the legal consequences arising from an internationally wrongful act and the various ways of implementing or suspending such

consequences. It was also considered logical for all provisions relating to the conduct of the injured State to be dealt with in a separate section.

51. While the treatment in Part Two of the legal consequences of an internationally wrongful act and the various forms of reparation was considered generally acceptable, questions and serious concerns were raised with regard to some of the provisions relating particularly to the new category of "serious breaches" as departing from existing international law.

Title

52. Different views were expressed concerning the title of Part Two, which was described, on the one hand as correct from the legal viewpoint and faithfully reflecting its contents, and on the other hand as requiring improvement since the part dealt with the nature, effects and implementation of the international responsibility of a State, which was not well expressed by the term "content".

Chapter I
General principles

53. There was support for chapter I of Part Two, which was described as particularly clear, concise, well structured and a fortunate addition, since it created a bridge to Part One and thereby clarified the basic structure of the draft articles.

Article 28 [36]
Legal consequences of an internationally wrongful act

Title

54. The title was described as inconsistent with the correct content of article 28, which indicated that international responsibility, and not the internationally wrongful act, entailed consequences.

Article 30 [41, 46]
Cessation and non-repetition

55. It was considered appropriate to combine the closely related concepts of cessation and non-repetition in draft article 30. It was noted that assurances of non-repetition were closely and logically related to the obligation to cease the wrongful act and could, in some contexts, offer tangible proof that the State having committed an internationally wrongful act recognized its unlawful conduct. At the same time, the Drafting Committee's text was considered preferable to the Special Rapporteur's proposal because it reflected cessation and non-repetition as two separate concepts.

Subparagraph (b)

56. The view was expressed that the principle of non-repetition still had a limited place in daily diplomatic practice and any effort to distinguish that principle as a political statement or a legal term was more relevant to the Commission's work on unilateral acts. Assurances and guarantees of non-repetition were considered indispensable under certain circumstances, including cases of wrongful acts involving the use of force, while their exact form could be determined on the basis of international practice. However, it was also remarked that the usefulness of the obsolete requirement that States should give guarantees of non-repetition was doubtful.

57. The obligation to offer appropriate assurances and guarantees of non-repetition was understood to arise as a function of the risk of repetition, the gravity of the wrongful act and the nature of the obligation breached. It was also felt that assurances of non-repetition were required not only where there was a pattern of repetition of the wrongful act, but also where there was a risk of repetition or, alternatively, where the breach was particularly grave, even if the risk of repetition was minimal. The addition of the words "if circumstances so require" was said to clarify the dependence of the concept on the particular context.

58. There was agreement with the Special Rapporteur that this provision touched upon the relationship between municipal and international law, because if the breach stemmed from a domestic law the requirement could be a means of compelling a State to amend or repeal it.

Article 31 [42]
Reparation

59. Support was expressed for the obligation to make reparations as one of the general principles governing the international responsibility of States. Support was also expressed for referring to the responsible State's obligation to provide reparation, and not the injured State's right in that regard, to obviate the need to determine which State or States had been directly or

indirectly injured. It was suggested that owing to the various special circumstances to be considered by judges in cases involving reparation for injury, it would be best to provide general guidelines in the text and further explanations in the commentary.

Full reparation

60. A number of delegations expressed support for the fundamental principle of full reparation for injury, which was well established in international law and jurisprudence. While noting that history had shown that in some cases insisting on full reparation could do more harm than good, the view was expressed that there was no reason to depart from the principle, which was not defective. It was also remarked that concerns regarding the principle seemed excessive, since international jurisprudence ensured that all circumstances would be taken into account in any specific case. However, attention was drawn to the relationship between this principle and former article 42, paragraph 3, which provided that reparation should not deprive the population of a State of its own means of subsistence. It was suggested that the two approaches were not contradictory and could therefore coexist by limiting the principle of full reparation to ensure the protection of items required for livelihood. The provision was also described as inadequate and requiring further consideration because full reparation was only possible where the damage could be clearly quantified, which would not normally be the case with internationally wrongful acts.

Causation

61. It was remarked that draft articles 31 to 34 satisfactorily stressed the need for a causal link between the wrongful act and the resulting injury. However, the view was also expressed that the issue of "remoteness of damage" had not been resolved in the draft articles and this omission should be remedied, although the relevant primary rules might not exist in most cases.

Mode of the breach

62. The view was expressed that article 31 should take into account the mode of the breach since the responsibility of a State, and thus the obligation to provide reparation, would differ depending on whether the wrongful act had been committed intentionally or through negligence. While noting that a cause-and-effect relationship between a breach of international law and the presence of damage was enough to make the State committing the breach responsible for the damage, it was considered possible that a minor violation, through a combination of exceptional circumstances, might lead to considerable damage which the responsible State had been unable to anticipate. Referring to the distinction drawn in draft article 40 between contributing to damage by a wilful or a negligent action or omission, it was suggested that the same distinction should be drawn with regard to the State responsible for the breach of international law by providing for a limited and mitigated form of responsibility in cases where there was no intention of causing harm or where it was impossible to anticipate the damage at the time the internationally wrongful act was committed.

Paragraph 1

63. The view was expressed that paragraph 1 was generally acceptable but should be rephrased for consistency with draft article 30, as follows: "The State responsible for the internationally wrongful act is under an obligation to make full reparation for the injury caused by that act."

Paragraph 2

64. The view was expressed that the concept of damage was satisfactorily defined in draft articles 31 to 34. In particular, support was expressed for the possibility of claiming reparation for moral as well as material injury, as recognized in article 31, paragraph 2. However, the following concerns and suggestions were also expressed regarding moral damage: it was questionable whether the same concept of moral damage was applicable to all forms of reparation, namely, restitution, compensation and satisfaction; such a general clause without a concise definition would not provide clarification for tribunals which were cautious in respect of non-material damage; article 31, paragraph 2, article 37 and article 38, paragraph 1, required further consideration to avoid being interpreted as permitting compensation for moral damage since there was no material reparation for moral damage suffered by States, merely satisfaction; article 31 should be amended, if necessary, by a reference to the provisions of the draft dealing with claims brought by directly or indirectly injured States to avoid claims for compensation for moral damage,

for which reparation was to take the form of satisfaction only.

Article 32 [42]
Irrelevance of internal law

65. It was remarked that article 32 was of great importance not only for the determination of responsibility but also with respect to other aspects of the law on State responsibility, including the origin of such responsibility.

66. It was also suggested that the provision meant that domestic law could not be relied upon in order to avoid an international obligation and therefore should be included in Part Four.

Article 33 [38]
Other consequences of an internationally wrongful act

67. Support was expressed for the new wording of article 33, which made reference to applicable rules of international law other than the draft articles. However, it was suggested that article 33, which covered the same question as article 56 and allowed for reference to other rules of international law applicable to a specific situation, should be included in Part Four. In that connection, reference could be made to article 60 of the Vienna Convention on the Law of Treaties or to other multilateral international conventions providing for self-contained regimes.

Article 34
Scope of international obligations covered by this Part

Paragraph 1

68. Support was expressed for including in paragraph 1 a general provision introducing obligations *erga omnes* as a general principle. However, it was also suggested that paragraph 1 should end after the words "circumstances of the breach", since the reference to beneficiaries other than a State was questionable and required at least further consideration and the inclusion of the concept in articles 49 and 54.

Paragraph 2

69. Support was expressed for paragraph 2. In contrast, the paragraph was considered unclear as to the relationship between the law on State responsibility and claims for reparation based on private law brought before the national courts of the responsible State. While the right of individuals to invoke international law on State responsibility was considered acceptable, it was felt that such an approach might go beyond State practice.

Chapter II
The forms of reparation

70. Chapter II was described as particularly clear, concise and well structured. It was felt that the Commission had achieved a good balance between the forms of reparation for an injury caused by an internationally wrongful act, stressing the requirement of full reparation but incorporating sufficient flexibility so that the obligation did not become unduly burdensome. While supporting the reformulation of the articles on the forms of reparation to strengthen the obligation of the responsible State, caution was advised since in certain cases moderation was necessary.

Priority of forms of reparation

71. There was support for establishing a priority among the forms of reparation, with restitution being described as the primary, the preferred and the best means of reparation. It was felt that compensation should be a secondary form of reparation if restitution were impractical or involved a burden out of all proportion to the benefit. Monetary compensation was considered important, particularly since it was often politically difficult for States to return expropriated property, which was often the subject of disputes. Satisfaction was described as a last resort when restitution or compensation was impossible. The succession of forms of reparation was considered sufficiently expressed in the draft articles.

Article 36 [43]
Restitution

72. The view was expressed that restitution should be understood as restitution in full in the general sense, rather than as a requirement to restore the exact situation which existed before the breach. It was noted that there might be occasions where restitution alone could not provide full reparation. It was also suggested that article 36 should be amended to refer to re-establishing the situation which would have existed if the wrongful act had not been committed, which did

not necessarily imply that full restitution should be made.

Subparagraph (a)

73. The expression "not materially impossible" was understood as covering those cases in which full reparation would deprive the responsible State of its means of subsistence.

Subparagraph (b)

74. There was support for the decision not to mention the political independence or economic stability of the responsible State as factors affecting the obligation of reparation, since such factors were difficult to assess and lent themselves to abuse; moreover, under international law, domestic circumstances did not affect a State's obligations under international agreements.

75. In contrast, there was a suggestion to retain former article 43, subparagraph (d), which envisaged situations in which restitution would seriously impair the economic stability of the responsible State, or to indicate that the subparagraph removed was covered by the new subparagraph (b). There was also a suggestion to extend article 36 (b) to cover reparation within the meaning of article 37 or to reformulate it as a general provision for the chapter concerned.

Article 37 [44]
Compensation

76. There was support for addressing compensation by means of the flexible formula in article 37 and allowing the rules on quantification to develop through practice and decisions, since detailed guidance on quantification might be insufficiently flexible to meet all the circumstances that might arise and would make the conclusion of the draft articles more difficult. However, there was also support for including a method for determining the amount of compensation. The view was also expressed that article 37 should be clarified to align the definition of compensation with recognized principles of international law; compensation should be limited to avoid being so burdensome as to exceed the capacity of the responsible State and to take account of the basic needs and developmental requirements of that State and its people; and measures taken to exact compensation should not become an instrument of vengeance and punishment rather than a mechanism for strengthening the international rule of law and promoting stability in international relations.

Paragraph 2

77. There was support for paragraph 2, which was interpreted as excluding purely environmental damage. However, it was also suggested that it should be redrafted to incorporate greater flexibility.

78. While there was support for including loss of profits, it was also described as a controversial concept which should be the subject of a separate article.

79. There were different views as to whether "any financially assessable damage" should include moral damage. It was suggested that the provision should be clarified to cover moral damage to be consistent with the commentary to former article 44 and international arbitral jurisprudence. In contrast, it was remarked that introducing compensation for moral damage required a deliberate decision to change international law, which was not warranted or practical.

Article 38 [45]
Satisfaction

80. The following views were expressed in support of article 38: Satisfaction played a symbolic role in facilitating the settlement of disputes, since in many international conflicts non-material damage could acquire great significance; satisfaction should be included as a separate form of reparation because it represented the corollary of a declaration by a court that an act was internationally wrongful; and satisfaction for injuries which could not be made good by restitution or compensation was the natural outgrowth of article 31. In contrast, it was remarked that the usefulness of the obsolete requirement that States should give satisfaction was doubtful.

Paragraph 1

81. There were different views concerning satisfaction for moral injury. It was suggested that satisfaction served to provide reparation for non-material injury and the reference to "injury" in paragraph 1 should be understood in that light. It was also suggested that satisfaction should be linked and specially tailored to reparation for moral injury, which had no material character since, in the case of material injury, satisfaction might be an additional form of reparation accompanying restitution or compensation,

but was not an alternative to the first two forms, proportionate or sufficient. In contrast, it was felt that introducing compensation for moral damage required a deliberate decision to change international law, which was not warranted or practical.

Paragraph 2

82. It was suggested that other examples, such as nominal damage and disciplinary or penal action, should be cited to indicate the range of options since those listed shared similar characteristics. However, there was opposition to including the punishment of individuals or punitive damages as not being confirmed by State practice. It was also suggested that satisfaction could be defined as a special form of compensation in cases involving non-material damage, while the acts listed had to be accomplished irrespective of the form of compensation.

Paragraph 3

83. Support was expressed for paragraph 3 to prevent excessive demands in respect of satisfaction. However, it was also suggested that the principle of proportionality should not be mentioned to avoid implying that it applied only in cases of satisfaction.

Article 39
Interest

84. There was support for new article 39 concerning interest. However, it was suggested that the provision should exclude satisfaction, which concerned damages that were not economically quantifiable.

85. In contrast, the view was expressed that interest should be addressed as an integral part of compensation in article 37. While believing that interest was sufficiently covered by compensation for "any financially assessable damage" under article 37, paragraph 2, it was also suggested that article 39 should become paragraph 3 of article 37.

Paragraph 1

86. The flexibility of draft article 39 was welcomed since international practice and jurisprudence had not unanimously confirmed the existence of an obligation to pay interest in all cases. In contrast, the stipulation that interest was payable only "when necessary in order to ensure full reparation" was considered unwarranted since it was difficult to envisage a situation where interest would not be due.

Paragraph 2

87. Support was expressed for the flexibility reflected in paragraph 2 since interest on any economic loss should be assessed from the date on which the damage occurred, although that date might not be appropriate in all cases.

Article 40 [42]
Contribution to the damage

88. Support was expressed for the general thrust of article 40. While noting the view that the obligation of the injured State to mitigate the damage was not clearly supported by international law, it was felt that the issue could only be decided on a case-by-case basis. A decision as to whether the contribution to the damage was the result of a negligent or a wilful action would depend on the circumstances and on the applicable legal instruments, some of which touched upon the issue of mitigation of damage. It was suggested that it would be preferable to refer to mitigation of the legal consequences of an internationally wrongful act rather than mitigation of State responsibility since a State's responsibility would not be mitigated, but the legal consequences of the wrongful act could be made less severe or intense for that State.

Chapter III
Serious breaches of essential obligations to the international community

89. There was broad support for deleting the controversial notion of "State crimes" in former article 19 for the following reasons: the notion was confusing, ambiguous and not established in international law; it was impossible to avoid the criminal-law connotations of the term "international crime"; State responsibility under international law was sui generis rather than civil or criminal in nature; the notion blurred the distinction between State responsibility and individual responsibility; and introducing the concept encountered insurmountable obstacles in both theory and practice in an international community made up of sovereign States in which *par in parem imperium non habet* was a basic legal principle.

90. The following observations were made concerning the relationship between the notion of State crimes and individual criminal responsibility: the development of the notion of individual criminal responsibility, as in the Rome Statute of the International Criminal Court, obviated the need for the notion of State crimes; deleting the concept did not have any implications for the existence in law of the notion of international crimes or diminish the personal legal responsibility of a person committing an internationally wrongful act; and decisions on individual criminal responsibility should be reserved for national courts, the international ad hoc tribunals and the future International Criminal Court.

91. In contrast, some delegations would have preferred to retain the notion of State crimes, which was said to constitute a valuable contribution to the development of international law and to contain an intrinsic deterrent value that was lacking in the term "serious breaches". It was remarked that international law had already established the existence of *erga omnes* obligations; the draft articles should codify the existing variations in concepts of responsibility in order to increase the effectiveness of response to specially serious wrongful acts and to prevent abuses; and a regime of responsibility for wrongful acts affecting the fundamental interests of the international community would in no way constitute a criminal code similar to those provided for under national legal systems. In order to achieve consensus and ensure the Commission's adoption of the draft articles, it was considered an acceptable compromise to delete the term "crime" while maintaining the essence of former article 19 in new article 41: the concept of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests and the definition of a "serious" breach of such an obligation, which, by implication, did not include mere negligence on the part of the responsible State.

92. Some delegations welcomed the Commission's current approach of recognizing a special category of particularly serious breaches by a State and regulating a heightened regime of international State responsibility for such breaches in the draft articles, with references being made to the Vienna Convention on the Law of Treaties and the decision of the International Court of Justice in the *Barcelona Traction* case. Particular importance was attributed to chapter III given the extension of the effects of the draft articles to the obligations that States owed to the international community as a whole (article 34, para. 1). Support was expressed for chapter III as an acceptable compromise which: permitted a balance to be found; successfully embodied the values underlying former article 19, without referring to "crimes"; avoided the shortcomings of former article 19 while subjecting serious breaches of obligations *erga omnes* to a special regime of State responsibility; and avoided jeopardizing what had been achieved so far.

93. However, other delegations expressed doubts about both the content and scope of the new category and the consequences of States committing such serious breaches. The view was expressed that the chapter and related articles required further refinement to enable the international community to reach consensus on the issue in terms of a clear definition of the breaches involved, a restrictive definition of the injured State, specific rules on how responsibility could be invoked, strong safeguards against the unlawful use of countermeasures and a clear enumeration of their limits. The distinction between serious breaches and other breaches was questioned as simply another term for "international crime", as contrary to customary international law and as unnecessary since the scope and nature of the breach would determine the consequences of the wrongful act under chapters I and II of Part Two. It was felt that international law was not sufficiently clear as to which obligations would fall within the category of serious breaches; the creation of such a category was not justified by the special consequences in article 42, which were neither special nor appropriate; and the creation of such obligations and their special consequences could only be undertaken in the context of primary rules. An additional concern was that including such consequences in a separate chapter devoted to "serious breaches" implied that they could not apply to any other breaches of obligations, whatever the circumstances.

94. There was some support for replacing chapter III of Part Two and draft article 54, paragraph 2, with a saving clause to the effect that the draft articles were without prejudice to any regime that might be established to deal with serious breaches of obligations *erga omnes*. It was felt that such an approach would not harm the structure or the objectives of the draft articles as a whole. It was also felt that the current

location of the articles on that subject throughout Part Two and Part Two bis confused the otherwise logical division of the draft articles.

Title

95. There were two suggestions concerning the title to chapter III: first, the title should be harmonized with the heading of draft article 42; and second, the chapter should be entitled "Responsibility arising from serious breaches ..." since it concerned international responsibility arising from an internationally wrongful act.

Article 41
Application of this Chapter

96. Some delegations endorsed article 41 as a step in the right direction and an acceptable compromise that would end the long-standing conflict on former article 19. However, a number of delegations felt that the definition of serious breaches was too general, and that this had serious implications for other articles contained in Part Two bis by creating a risk of abuse by States purporting to act in the interests of the international community, for example, by taking collective countermeasures.

97. It was suggested that a more precise definition was needed to take into account the special quality of breaches of *erga omnes* obligations. It was also remarked that the concept of essential obligations for the protection of basic interests, which justified the intervention of States that were not directly injured, should be further clarified because it was directly related to the concepts of *jus cogens* and obligations *erga omnes*, with respect to which international codification efforts had not made much progress. However, a concern was also expressed that article 41 appeared to create a new category of super-norm by combining two different categories — obligations owed *erga omnes* and obligations arising from peremptory norms of international law.

98. There were also suggestions to delete article 41 because it failed to depart from the concept of "international crime" and constituted a primary rule which exceeded the Commission's mandate. It was also remarked that in the unlikely event that draft article 41 was retained, consideration should be given to placing it elsewhere in the draft, perhaps at the end of Part One, chapter III.

The notion of the "international community as a whole"

99. The view was expressed that the term "international community as a whole" should be retained in article 34, paragraph 1, article 41, paragraph 1, article 43 (b) and article 49, paragraph 1 (b), because the concept existed in international law and appeared in the Rome Statute of the International Criminal Court. It was felt that the international community defined in a broad sense would encompass non-governmental organizations and individuals as well as States, and in view of the practice of humanitarian intervention, it would be appropriate to enable victims of human rights abuses to invoke State responsibility.

100. In contrast, a number of delegations expressed concern about this term, which was described as vague, unclear, too broad, potentially misleading, confusing, not a legal concept, and giving rise to problems in the interpretation and practical application of the draft articles. It was remarked that the term seemed to suggest that some countries would carry more weight than others, whereas it was necessary to look to common denominators, not the aspirations of a self-appointed elite, since States had different political, social and economic backgrounds.

101. Several delegations expressed a preference for the phrase "the international community of States as a whole", used in article 53 of the 1969 Vienna Convention on the Law of Treaties, or simply "all States". The concept of "the international community of States as a whole" was considered preferable to clarify the exclusion of other subjects of law such as international organizations, non-governmental organizations and individuals. The concept of the international community of States was also described as less exacting than that of "all States", because the obligations towards the former should not necessarily be regarded as peremptory norms for each State individually, provided that they were recognized by a broad majority to ensure that the veto of a minority could not prevent the obligations from arising. However, it was also remarked that article 53 of the 1969 Vienna Convention had been accepted by States only because safeguards had been incorporated into article 66, providing for referral to the International Court of Justice in the event of a dispute as to its interpretation or application; moreover, the notion had

been intended to regulate a primary, not a secondary rule, and required adaptation in order to fit into the structure of the current draft.

The meaning of the term "fundamental interests"

102. Several delegations questioned the meaning, the content and the nature of the term "fundamental interests". It was remarked that although the concept of serious breaches had a basis in *jus cogens* and in the decision of the International Court of Justice in the *Barcelona Traction* case, the exact meaning of the "fundamental interests" of the "international community" remained unclear. It was suggested that it was for the international community itself, acting through a unanimous or nearly unanimous decision, in a forum which admitted of universal participation by States, to determine the essential obligations for the protection of its fundamental interests. It was also queried whether the "fundamental interests" referred to in paragraph 1 of draft article 41 were different from the "essential interest" mentioned in paragraph 1 (b) of draft article 26.

The possible incorporation of elements of former article 19

103. While agreeing that it was not necessary to refer to the notion of "international crimes", some delegations felt that the substance of former article 19 was still relevant and that including some examples listed in that article would help to clarify the definition of serious breaches. The deletion of those examples was considered regrettable, notwithstanding the Special Rapporteur's intention to include such material in the commentary. In contrast, it was remarked that former article 19 had given rise to ideological conflict and had allowed political considerations to have a bearing on States' acceptance of the notion.

Paragraph 1

104. There were different views as to whether article 41, paragraph 1, referred to *jus cogens* or obligations *erga omnes* or both, as follows: it remained to be established whether article 41 referred to obligations *erga omnes* and what such obligations would include in the context of the draft articles; article 41 was a welcome codification of obligations *erga omnes*; paragraph 1 was an acceptable combination of the institutions of *jus cogens* and obligations *erga omnes*; the use of both concepts of *jus cogens* and obligations *erga omnes* in paragraph 1 resulted in considerable uncertainty; and it was unfortunately unclear whether article 41 referred to obligations *erga omnes* as defined by the International Court of Justice in the *Barcelona Traction* case, or to obligations with a *jus cogens* character or to some other more limited circle of actions that would constitute State "crimes", but the question was not crucial. While noting that not all human rights gave rise to obligations *erga omnes*, it was felt that creating a hierarchy among human rights was contrary to the Universal Declaration of Human Rights and recent developments in human rights law.

Paragraph 2

105. Paragraph 2 gave rise to a number of concerns, as follows: the definition of a "serious breach" was too vague and overly inclusive; the definition of a "gross or systematic failure" and the standard implied by the phrase "risking substantial harm" were questioned; the reference to the systematic nature of the breach and the unnecessary reference to the risk of causing substantial harm to the fundamental interests protected by the obligation in question were described as obvious defects; defining serious breaches as those involving a gross or systematic failure to fulfil the obligation provided no objective way of drawing the line between serious and other breaches, particularly in the areas of human rights and environmental protection, where the concept was of the most practical significance; the additional requirement of a "gross or systematic failure" was considered inappropriate because serious breaches concerned obligations that were essential for the protection of the international community's fundamental interests; and in the interests of clarity, the words "of the international community as a whole" should be inserted after "interests".

Article 42 [51, 53]
Consequences of serious breaches of obligations to the international community as a whole

106. There was support in principle for the consequences set forth in article 42, which was described as an acceptable compromise since an in-depth discussion of the issue of consequences could be postponed to a later date. Support was also expressed for excluding the proposed reference to penal consequences, since such consequences were

inconceivable in international law with regard to States.

107. However, there were also doubts and concerns about those consequences, which were described as imprecise, unsatisfactory and the primary problem. It was emphasized that the consequences of such breaches should be considered in the light of the delicate link with article 49 on the invocation of responsibility by States other than the injured State and article 54, paragraph 2, which provided that any State might take countermeasures in cases referred to in article 41. It was noted that the obligations set forth in article 42 were also applicable to situations resulting from other types of violations. The view was expressed that the greatest difficulty resided in the implementation of the heightened regime of international responsibility when a "serious breach" was committed; such a regime should include an express reference to the international rules on individual criminal responsibility, such as the Rome Statute of the International Criminal Court; and the Commission should clarify the obligations of all States provided for in draft article 42, both in the text and in the commentaries.

108. There was also a suggestion to delete article 42 because it failed to depart from the concept of "international crime". It was further remarked that in the unlikely event that it was retained, it should perhaps be placed elsewhere, such as at the end of Part One, chapter III.

Title

109. It was remarked that chapter III concerned international responsibility arising from an internationally wrongful act and therefore the title of article 42 should be amended to read "Responsibility arising from serious breaches of international obligations".

Paragraph 1

110. The concept of "damages reflecting the gravity of the breach" contained in paragraph 1 was described as acceptable with certain exceptions. It was noted that the consequences should not necessarily be limited to punitive damages.

111. However, there were also a number of concerns regarding the reference to such damages, which was described as containing an unnecessary punitive element and reflecting the concept of criminal liability of a State. Several delegations questioned whether the phrase referred to "punitive damages", which in their view should not be included because such damages were not recognized in international law or were contrary to customary international law. It was also remarked that, while it was questionable whether punitive damages had a place in international law, if they did, they were potentially applicable to certain breaches of any international obligation. The use of the word "may" was considered insufficient to address these concerns since it was not clear who would decide whether a certain obligation "may" involve damages reflecting gravity. It was suggested that it would be preferable to indicate simply that such breaches entailed an obligation to make reparation in accordance with draft articles 35 et seq.

112. In contrast, a concern was further raised that the article failed to provide for satisfactory damages or reparation arising from aggression or genocide. It was suggested that the text should be more specific by providing in article 42 or the commentary that "serious breaches" called for damages exceeding the material losses suffered in consequence of the breach.

Paragraph 2

113. The view was expressed that envisaging the concept of *actio popularis* in the draft articles, including the obligations set forth in article 42, paragraph 2, was welcome; the collective reaction of the international community of States to a serious breach of the obligations owed to it and essential for the protection of its fundamental interests was an important deterrent; and furthermore, it encouraged the cessation of the wrongful act and contributed to the realization of the forms of reparation sought.

114. The view was also expressed that the enumeration of obligations arising for third States in article 42, paragraph 2, was inspired by the advisory opinion of the International Court of Justice in the *Namibia* case, which, however, had concerned the legal consequences for States of an occupation of territory declared illegal by the Security Council. It was suggested that it would be preferable to provide a less prescriptive formulation, as in draft article 42, paragraph 1, given the difficulty of elaborating a single rule for all purposes.

115. The view was further expressed that the relationship between paragraph 2 and the Security

Council, as the core organ in the United Nations collective security system, required further study because paragraph 2 (a) and (b) created a parallel legal mechanism. It was felt that, absent a universally acceptable international mechanism to judge the serious breaches referred to in article 41, the imposition of such an international obligation would be problematic.

Paragraph 2 (a)

116. The view was expressed that paragraph 2 (a) served no purpose. It was remarked that the obligation not to recognize as lawful the situation created by the breach did not result exclusively from serious breaches since no internationally unlawful acts should be recognized as lawful. It was also noted that paragraph 2 (a) did not make clear whether implicit, as well as explicit, recognition was prohibited; and there was no reference to time frames.

Paragraph 2 (b)

117. The view was expressed that paragraph 2 (b) served no purpose. It was also remarked that no internationally unlawful acts should be assisted.

Paragraph 2 (c)

118. Paragraph 2 (c) gave rise to the following concerns: the obligation to cooperate was not limited to cases of serious breaches; paragraph 2 (c) was ambiguous and might encourage States to resort to possibly excessive countermeasures in defence of the obligations referred to in draft article 41; it was inappropriate and unwise to impose a general and unspecified legal obligation upon third States in paragraph 2 (c) which was too broad, was unsupported by international law and might also undermine existing collective mechanisms designed to regulate and coordinate international responses to serious breaches; the obligations could be misinterpreted, since they seemed to permit any type of cooperation aimed at ending a breach of a peremptory norm of international law; and it was unclear whether paragraph 2 (c) related to cooperation in taking countermeasures under article 54 or was a separate obligation, and whether it was subject to limitations.

119. The following suggestions were made: paragraph 2 (c) should be amended to indicate that other States should cooperate with one another as well as with the injured State to bring the breach to an end; the paragraph should refer directly to countermeasures, in accordance with draft article 54, paragraph 2, and the commentary should clarify that the rule in no way legitimized the use of force except in full conformity with the letter and spirit of the Charter of the United Nations; and the qualifying phrase "as far as possible" should be deleted and the obligation to cooperate should also be extended to measures guaranteeing the implementation of the responsibility of the State responsible for the internationally wrongful act.

Paragraph 3

120. The obligations envisaged in article 42, paragraph 3, were questioned as not having a firm basis in customary international law.

121. A suggestion was made to refer to Chapter VII of the Charter of the United Nations and to amend paragraph 3 to read: "This article is without prejudice to the consequences referred to in Chapter II of this Part and to such further consequences that the serious breaches may entail under international law."

4. Part Two bis. The implementation of State responsibility

122. Support was expressed for Part Two bis, which was described as a clear improvement on the previous draft. Two developments were singled out for special mention: (a) the conceptual shift from the responsible State to the right of a State to invoke responsibility, and (b) the distinction between injured States and other States that were entitled to invoke responsibility. Agreement was also expressed with the Commission's decision to give States flexibility in the establishment of criteria and procedures, along the line of past experience with other codification conventions. Conversely, the view was expressed that Part Two bis did not appropriately reflect the inclusion of the provisions on serious breaches of essential obligations to the international community, contained in paragraph 1 of article 41.

123. It was suggested that Part Two bis could be included in Part Two, which would be divided into two sections on content and implementation, respectively.

Chapter I
Invocation of the State responsibility of a State

Article 43 [40]
The injured State

124. Support was expressed for the definition of "injured State" in draft article 43, as a recognition of the increasing diversity of international obligations, as well as for the distinction between States that were individually injured and those which, while not directly injured, nevertheless had a legal interest in the performance of the obligation (draft article 49). It was emphasized that it was important to maintain a clear distinction between the two categories and to explain the reasons for that distinction. It was noted that, since the causal link between the wrongful act and the injury suffered was determined by the primary rule, the facts had to be known before the distinction between directly injured States and other States could be ascertained.

125. It was proposed that it should be made clear that an "injured" party was the one to whom an international obligation was due. Although all other States might be affected by the breach of the obligation, having a legal interest in its performance, they were not necessarily "injured". A "right" to an obligation and an interest in its performance were two different notions with different consequences. In turn, they had a bearing on the responsibility of the State, and on the right to remedies or countermeasures, whereby certain States might request rights to which they were not entitled under the current international legal system. While the legal interest existed for both categories of States, in practice it was the specifically injured State that had the right to reparations. Support was also expressed for the inclusion, albeit implicit, of a reference to damages in the definition of the injured State.

126. In terms of a further view, the formulation of draft article 43 was obscure and required more generic language. It was also suggested that the Commission could try to narrow the definition of an injured State even further.

127. Others questioned the distinction drawn in draft articles 43 and 49 between the "injured State" and "States other than the injured State". It was maintained that the notion of "injured State" on first reading was clearer and more direct than the notion of a "State entitled to invoke responsibility", especially in connection with serious breaches. Under this view, all States were injured by the legal consequences of a serious breach of an essential obligation to the international community, although some might be specially affected. Conversely, it was pointed out that the definition of the injured State, as adopted on first reading, had created confusion between the rights of the injured State and those of States that were not necessarily injured by the commission of an internationally wrongful act but had a legitimate interest in the fulfilment of the obligation breached.

Subparagraph (a)

128. It was suggested that it should be made clear in the text of subparagraph (a) that the obligation in question was of a bilateral nature. Disagreement was expressed with the view that third States should be permitted to intervene in cases involving the violation of a bilateral obligation if the State directly affected did not wish to respond.

Subparagraph (b)

129. On subparagraph (b), it was proposed that reference be made to the "damage suffered" by the specially affected State and to the fact that such damage could include that which resulted from the breach of an obligation which affected States' enjoyment of their rights or performance of their obligations. Furthermore, the suggestion was made to insert in articles 43 and 49 the phrase "a serious breach by a State of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests", contained in article 41.

130. With regard to subparagraph (b) (ii), the view was expressed that it was difficult to make a distinction between a collective obligation and an obligation established for the protection of a collective interest, as referred to in article 49. It was pointed out that the reference to the breach being "of such a character as to affect the enjoyment of the rights or the performance of the obligations of all the States concerned" was too broad and could blur the distinction between injured States and other States. For some, the question was whether such a distinction was really possible without the notion of injury. While it was conceded that the breach of a collective obligation, as defined in subparagraph (b) (ii), could not be explained by the traditional notion of injury, the view was expressed that

it was unclear whether the notion of a collective obligation had become accepted in international law to the extent that the omission of the concept of injury was justified. It was also pointed out that the distinction between draft articles 43 and 49 appeared to imply that in the case of integral obligations all States were affected, and in the case of a collective interest, States not directly affected were interested only in the performance of an obligation. However, such a subtle distinction could lead to unnecessary confusion and possible abuse. Similarly, it was noted that, in practice, problems might arise as to the capacity of a State to invoke responsibility, particularly in the case of a breach of multilateral obligations. It was queried whether the provision was also intended to cover international human rights instruments, specifically excluded from article 60, paragraph 5, of the 1969 Vienna Convention on the Law of Treaties.

Article 44
Invocation of responsibility by an injured State

Paragraph 1

131. The view was expressed that the requirement of notice of the claim went too far and would not succeed.

Paragraph 2

132. It was suggested that the priority established in favour of restitution under Part Two, chapter II, should be reflected in subparagraph (b) as well. Furthermore, the view was expressed that subparagagph (b) needed to be clarified so as to prevent the injured State from specifying a form of reparation which would impose a disproportionate burden on the other State.

Article 45 [22]
Admissibility of claims

Subparagraph (a)

133. The observation was made that the work of the Commission in the field of diplomatic protection would permit the elaboration of rules that could be applied to questions of the nationality of claims.

Subparagraph (b)

134. Satisfaction was expressed with the formulation of the exhaustion of local remedies rule in subparagraph (b), which reflected the exceptions to that rule recognized under international customary law. The view was expressed that the fact that the exhaustion of local remedies was one of the conditions for the admissibility of claims implied that the remedies were of a purely procedural nature. Accordingly, the rule should also be included in Part One of the draft text, as in the 1996 first reading.

Article 46
Loss of the right to invoke responsibility

135. Support was expressed for the absence of any reference to a statute of limitations in draft article 46. Clarification was requested as to what kind of conduct by an injured State constituted valid acquiescence, and what time frame was required for a claim to lapse.

Article 49
Invocation of responsibility by States other than the injured State

136. Support was expressed for draft article 49, which was regarded by some as necessary in the context of the provisions concerning serious breaches of obligations to the international community as a whole. It was also necessary for the application of the regime governing international responsibility to the human rights and international humanitarian law provisions having the force of *jus cogens*; and it was relevant in cases where the obligation breached was owed to a group of States, such as the parties to a multilateral treaty on human rights or the environment, or to the international community as a whole.

137. Conversely, it was suggested that the desirability of draft article 49 remained to be determined, and that its lack of precision might lead to the justification of collective sanctions or collective interventions. As such it was proposed that the provision should be deleted.

Paragraph 1

138. Support was expressed for the proposition that States which, although not injured, had a legal interest in the performance of the obligation breached should be entitled to invoke responsibility for the breach of the obligation. At the same time, it was observed that the indirect character of the injury must be taken into account in a way that narrowed the options of the State indirectly injured as compared with the State suffering direct injury. In order to distinguish between directly and indirectly injured States, it was therefore necessary

to ensure consistency between article 41, paragraph 1, article 49, paragraph 1 (b), and article 50, paragraph 1. Under another view, in a situation where the breached obligation protected a collective interest or the interest of the international community, no State should by itself, without the concurrence of at least a substantial number of other concerned States, invoke the responsibility of another State.

139. As to the drafting of the provision, the view was expressed that it was difficult to distinguish between injured States and those which had only a legal interest. Therefore, it was suggested that the States being referred to should be qualified as "injured" in that their right to the protection of a collective interest had been violated under an instrument by which they were bound.

140. Regarding paragraph 1 (a), it was observed that the concept of obligations *erga omnes* was indeterminate and raised difficult issues concerning the requisite legal interests and the standing of States. Therefore, a general provision enabling more than one State to invoke the responsibility of another in respect of a wrongful act could give rise to serious abuses until there was a definition of "collective interests" and the means of implementing and enforcing them. Under another view, the phrase "collective interest" ought also to be clarified in order to elucidate the scope of draft articles 49 and 54. It was also pointed out that the possibility of a conflict between the interests of a group of States and those of the international community as a whole should be avoided. It was further suggested that it should be made clear that States with only a legal interest could seek cessation of another State's violation but could not seek reparation for damage caused by an internationally wrongful act by which they were not directly affected.

141. As to paragraph 1 (b), the view was expressed that it was generally accepted that all States had standing to bring a claim in respect of a breach of an obligation owed to all States. Support was expressed for not limiting such standing to serious breaches.

Paragraph 2

142. Support was also expressed for the proposition that States which had a legal interest in the performance of the obligation breached should not receive the range of remedies available to States which had suffered actual injury. At the same time, it was suggested that the provision should be given further thought. It was observed that it was not clear whether the actions of such State had to be subordinated to, and coordinated with, the response desired by the directly injured State, or whether the former State could act independently, albeit in the interest of the directly injured State. It was proposed that the provision should be confined to cases in which the injured State was not in a position to exercise its right to invoke responsibility under draft article 49. The view was also expressed that the provision was questionable and that the phrase "of the injured State or" should be deleted. It was observed that the legal capacity of interested States, as opposed to injured States, was limited to their ability under customary law to call for the cessation of unlawful conduct and for reparation to be made to the injured State. Opposition was voiced against a reading of paragraph 2 that would allow interested States to act as "trustees" for the injured State in seeking reparation. Such an approach would have a destabilizing effect by creating a parallel mechanism for responding to serious breaches which lacked the coordinated, balanced and collective features of existing mechanisms.

Paragraph 3

143. It was observed that, in the light of the lack of a provision for cooperation, various States might formulate inconsistent or even contradictory requests, and that compliance with one such request and not others might further complicate the situation. It was suggested that a provision on cooperation similar to that contained in article 54, paragraph 3, should be included. Alternatively, provision could be made for the obligation on the part of all States interested in exercising their rights under paragraph 3 to agree on joint requests.

Chapter II
Countermeasures

144. Differing views were expressed on the question of countermeasures. It was suggested that countermeasures constituted a legitimate means available to a country injured by an internationally wrongful act. They were particularly important to the injured State, since they enabled it to get the responsible State to assume its obligations with respect to cessation and reparation or to negotiate in order to

settle the dispute without affecting the rights of that State, in conformity with the principle of reciprocity. At the same time, limitations on countermeasures were also necessary in order to safeguard the sovereignty of weaker States in the face of political countermeasures that were neither defined nor impartial. It was also observed that the regime of countermeasures, or reprisals not involving the use of force, already existed in international law for the purpose of obtaining reparation from the responsible State and securing the reversion to a situation of legality.

145. Support was expressed for the Commission's general approach of regulating countermeasures, with a view to limiting recourse to them, as opposed to not dealing with the issue at all, leaving it open-ended and liable to abuse. Several speakers welcomed the Commission's inclusion in the draft articles of the qualifications contained in articles 50 to 55. The draft articles were also considered to be an improvement over those adopted at first reading in that they established reasonable restrictions beyond existing case law on countermeasures, and that they sought to balance between the rights and interests of the injured State and those of the responsible State. Other improvements that were cited included the deletion of the ambiguous reference to "interim measures of protection".

146. At the same time, caution was advised: it was suggested that, in view of past and possible future abuses, the recognition of the right to take countermeasures must be accompanied by appropriate restrictions on their use. Several speakers indicated that the provisions on countermeasures in the draft articles needed further clarification and improvement. For example, it was suggested that the draft articles should make it clear that: countermeasures should be resorted to only in exceptional circumstances, with due regard for the prevailing circumstances within the international community; they should be necessary, proportionate, narrowly construed and applied objectively; they should not take the place of dispute settlement and should not be imposed if good-faith attempts to resolve the dispute were continuing; they must not be used as a form of retaliation, punishment or sanction; their humanitarian consequences and the need to protect civilian populations from their adverse effects should be kept in mind; they should only seek the cessation of the wrongful act, the restoration of respect for international law and reparation of the harm caused; they must not have consequences that could endanger international peace and security; they should under no circumstances involve the direct or indirect use of force, in violation of the principles of the Charter of the United Nations and international law; and States subjected to illegal countermeasures must not be left without recourse. It was also suggested that further consideration needed to be given to the criteria for determining the admissibility of countermeasures and their severity, as well as the question of the rights of third States which were not directly injured, especially the right of the third State to take countermeasures on behalf of the injured State, as well as the notion of breaches of obligations *erga omnes*. It was also proposed that the rules governing collective countermeasures should be even stricter than those governing bilateral ones.

147. The view was expressed that it was dangerous to separate the issue of countermeasures from that of the peaceful settlement of disputes. Support was thus expressed for the inclusion of provisions on binding dispute-settlement procedures (for example, in a separate article, immediately following article 50). Indeed, a separate provision on the peaceful settlement of disputes was considered necessary in the light of the fact that many States had not made the declaration under Article 36 of the Statute of the International Court of Justice. Furthermore, an objective appreciation could presumably be attained only through a judicial process. According to a different view, the Commission's decision not to link the taking of countermeasures to compulsory arbitration was welcomed since it would result in giving only the responsible State the right to initiate arbitral proceedings.

148. Others called for careful consideration of the limits and conditions placed on countermeasures. The view was expressed that countermeasures were effective instruments of law, and the restrictions placed on them by the draft articles should not be such as to deprive them of their usefulness. It was also stated that the provisions relating to countermeasures set forth restrictions that did not reflect customary international law. It was suggested that there was no rule under existing customary law requiring either that the existence of an internationally wrongful act should be determined by a third party before such recourse, or that prior negotiations should be entered into. In the *Air Services Agreement* case of 1978, the Arbitral

Tribunal had found that international law did not prevent a party from resorting to countermeasures before exhausting dispute-settlement procedures or during negotiations with the wrongdoer. Furthermore, if their termination took the form of terminating an obligation towards a defaulting State, the injured State should not be expected to fulfil an obligation which it had lawfully chosen to terminate rather than suspend. It was thus suggested that the Commission should consider whether the provisions relating to countermeasures in the draft articles on State responsibility could simply be deleted, or, if that was not possible, how the current text could best be revised to better reflect customary law. Other suggestions included only making a general reference in the text to countermeasures, or having the Commission consider the issue separately.

149. Still others voiced their opposition to countermeasures and to their inclusion in the draft articles. It was suggested that countermeasures constituted an archaic notion, favouring more powerful States, and thus had no place in an international community based on the sovereign equality of nations. It was observed that countermeasures were more common among Western States, and that those seeking to legitimize the practice were doing so through the development of legal rules on State responsibility based on Western practice. Countermeasures were depicted as constituting a threat to small and weak States, and often serving as a pretext for the adoption of unilateral measures such as armed reprisals and other types of intervention. Therefore, it was misleading to claim that their only purpose was to induce compliance by a wrongdoing State. Concern was further expressed over the lack of a provision in the draft articles ensuring that countermeasures did not have adverse effects for third States.

150. The degree of subjectivity in the application of countermeasures was also a matter of concern. In addition, a wrongful act committed by a State could not be taken to justify an action, whether by the injured State or any other, which, while initially legitimate, might itself have far-reaching consequences. Furthermore, because of the imbalance in the economic and other forms of influence between different States, the effectiveness of recourse to countermeasures would vary considerably, and it was possible that the countermeasures would aggravate the negative consequences of such inequalities and even exacerbate tensions between States parties to a dispute. Codifying a legal regime of countermeasures that did not take into account the de facto inequality between States, even if such an exercise took place with a view to the progressive development of international law, would only give legal sanction to what was a questionable practice. Given the possibility of serious abuse, a preference was expressed for excluding the issue altogether from the scope of State responsibility, leaving issues concerning such measures to be dealt with under general international law, especially under the Charter of the United Nations.

151. Regarding the provisions on countermeasures in chapter II, it was suggested that they should feature in a separate part of the draft articles, since their current location in Part Two bis gave rise to the incorrect impression that countermeasures derived from State responsibility. A further difficulty lay in the relationship between chapter II and draft article 23: if a provision on countermeasures was included as part of a list of circumstances precluding wrongfulness (as was the case with article 23), the question inevitably arose as to the lawfulness and legitimacy of countermeasures in situations other than self-defence, distress or state of necessity.

Article 50 [47]
Object and limits of countermeasures

152. Support was expressed for draft article 50. In particular, it was stated that countermeasures should not be limited to non-performance of a reciprocal obligation, and that States should be entitled to suspend the performance of an obligation unrelated to the obligation breached, provided that the principles of reversibility and proportionality were met. It was further suggested that a provision should be inserted in article 50 to ensure that countermeasures were calibrated so as to avoid irreversible consequences. Conversely, the view was expressed that the provisions in draft article 50 were unsatisfactory in their current form, in that there was some risk that large States would use them in their own interest.

Paragraph 1

153. A preference was expressed for outlawing punitive actions and for establishing strong safeguards against possible abuses of countermeasures. It was reiterated that the aim of countermeasures was to

induce law-abiding behaviour on the part of the responsible State. Therefore the injured State could not use any and all measures to induce such behaviour. Countermeasures aimed at the attainment of any other goal were by definition unlawful. It was proposed that the phrase "to comply with its obligations under Part Two" should be replaced by "to comply with its obligations under international law".

Paragraph 2

154. It was suggested that paragraph 2 should be amended to make it clear that an injured State could not take measures against third States in order to induce the responsible State to comply with an obligation. The view was also expressed that the wording of paragraph 2 raised some difficulty: conduct inconsistent with the provisions of a treaty, if justified as countermeasures, should not be considered such as to suspend the treaty itself. The treaty would continue to apply, and non-compliance with it could be accepted only for as long as the criteria for adopting countermeasures existed.

Paragraph 3

155. The proposal was made to replace the phrase "the resumption of performance of the obligation or obligations in question" with "subsequent compliance with the obligation or obligations in question", since some of the obligations might be instantaneous in character, for instance the payment of a sum of money.

Article 51 [50]
Obligations not subject to countermeasures

156. Support was expressed for draft article 51. The elimination of the distinction between obligations not subject to countermeasures and prohibited countermeasures was welcomed. Conversely, it was stated that the text still required some refinement. It was also proposed that, in order to alleviate the concern of small States, the Commission should restore former draft article 50 on "prohibited countermeasures", which had been elaborate and clear.

Chapeau

157. It was suggested that the chapeau was misleading in asserting that countermeasures would not involve "any derogation" from the enumerated obligations. Some of the relevant provisions, such as those for the protection of fundamental human rights, specifically allowed derogation in certain circumstances. In some instances, moreover, States had entered reservations preserving the right to take countermeasures. It was thus preferable to state that countermeasures must not involve the breach of those obligations of a State listed in the draft article. According to another view, human rights, even those which were derogable in extreme situations, could not be infringed by way of countermeasures.

Paragraph 1

158. Concerning the list of obligations contained in paragraph 1, subparagraphs (a) to (e), it was suggested that the Commission should consider it rigorously, since the objective of the provisions must be to facilitate the resolution of disputes rather than to complicate them; vagueness and duplication should be avoided. Support was expressed for the reordering of paragraph 1, to make it clear, first, that the prohibition against the threat or use of force, the protection of fundamental human rights and the obligations rising from humanitarian law were peremptory norms of international law and, second, that the list was not exhaustive.

159. Regarding subparagraphs (a) and (b), the view was expressed that the fundamental human rights and obligations of a humanitarian character referred to were those designed to protect the life and physical integrity of the human person, in accordance with article 60, paragraph 5, of the 1969 Vienna Convention on the Law of Treaties. Support was expressed for the mention of obligations of a humanitarian character, which were not limited to the protection of human rights. It was also proposed that provision should be made for other rules of *jus cogens* involving basic human rights rules, which were not subject to derogation in the case of countermeasures.

160. Several speakers welcomed the deletion of the reference to "extreme economic or political coercion"; while such a prohibition appeared to be justified where such measures were designed to endanger the territorial integrity of the State, it was covered by the principle of proportionality. Others expressed the view that there had been no compelling justification for deleting the provision prohibiting an injured State from resorting to "extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the

internationally wrongful act", which was language commonly used by the General Assembly and contained a principle important to developing States. It was suggested that such wording, which had been included in former article 50 (b), should be reinserted into the text. Disagreement was also expressed with the view that there was no need to refer to "political independence of the State", since it was implicit in "territorial integrity"; Article 2, paragraph 4, of the Charter of the United Nations made a distinction between those two principles, which were not interchangeable.

Paragraph 2

161. It was observed that paragraph 2 could be taken to imply that the imposition of countermeasures could precede recourse to dispute settlement procedures, thereby allowing powerful States to take countermeasures in order to impose their will regarding the selection of such procedures.

Article 52 [49]
Proportionality

162. Support was expressed for the treatment of the issue of proportionality in draft article 52. The following observations were made: that proportionality should be understood as the minimal degree of the measures necessary to induce compliance; that the three criteria laid down in the article were to be understood as not being exhaustive; that draft article 52 might not allow for countermeasures strong enough to induce compliance, or it might allow for excessive countermeasures; and that the element of "gravity" of the wrongfulness was a remnant of the concept of "international crime".

163. A preference was expressed for the adoption of a more negative approach by replacing the words "be commensurate with" by "not disproportionate to". It was also suggested that the provision should be simplified and that the reference to "the gravity of the internationally wrongful act" should be deleted, as it suggested that the State taking countermeasures was authorized to gauge the proportionality of its own act. It was also proposed that the provision should indicate not only that countermeasures must be commensurate with the injury suffered, but also that they should be designed to induce the State concerned to fulfil the obligation in question. In addition, the Commission was requested to consider ways of dealing with States that abused countermeasures or did not impose them in good faith.

Article 53 [48]
Conditions relating to resort to countermeasures

164. While support was voiced for draft article 53, the view was expressed that the provision required refinement. It was proposed that article 53 should make it clear that allegations of an internationally wrongful act must be substantiated by credible evidence before the injured State could take countermeasures. It was considered questionable whether it was justified in all cases to rely on the subjective assessment by the injured State. It was also suggested that a distinction could usefully be drawn between the countermeasures which a State was empowered to adopt because of a wrongful act of another State, and those based on a wrongful act arising from failure by the other State to comply with a decision of an international court. In the former case, the appraisal of the act was made unilaterally; in the latter case, the unfulfilled obligation emanated from a third, impartial source which the disputing parties had undertaken to respect.

165. It was queried whether the conditions imposed on the use of countermeasures were applicable in the case of breaches of obligations *erga omnes* or peremptory norms of international law. The view was expressed that the negotiation requirement should be excluded in those cases.

Paragraph 1

166. It was proposed that the phrase "to fulfil its obligations under Part Two" should be replaced by the words "to comply with its obligations under international law", and that a mechanism for dispute settlement prior to the imposition of countermeasures should be specifically provided for.

Paragraph 2

167. Support was expressed for the requirement of prior negotiations between the States concerned. The view was expressed that such requirement applied also to the provisional measures referred to in paragraph 3. It was observed that, generally speaking, it would be better to place the duty to negotiate on the perpetrator rather than the victim. It was proposed that provision should be made for dispute-settlement procedures other

than negotiation, such as mediation or conciliation, which could also cause the suspension or postponement of countermeasures.

168. The view was also expressed that the approach in paragraphs 2 to 5 was misconceived. The alleged duty to offer to negotiate before taking countermeasures, and to suspend countermeasures while negotiations were pursued, did not reflect the position under general international law, as stated in the *Air Services Agreement* case. It was impossible to lay down a rule prohibiting the use of countermeasures during negotiations. Nor would such a rule be either practical or desirable *de lege ferenda*. It would force the victim State to have recourse to one particular method of dispute settlement; it might be inconsistent with Article 33 of the Charter of the United Nations; and it might encourage States to break their obligations in order to force another State to negotiate. Moreover, there was little room to negotiate when genocide, for example, was being committed.

Paragraph 3

169. It was pointed out that if a State needed to take countermeasures, it could easily resort to provisional measures, thus making formal countermeasures a hollow procedure. Furthermore, there was no explanation why "provisional and urgent countermeasures" were more provisional than other countermeasures, and no special rules were provided for their application. It was suggested that paragraph 3 should be deleted, since countermeasures were by nature provisional and injured States must not be given occasion to neglect their obligation of notification and negotiation under paragraph 2. Instead, "provisional countermeasures" should be governed by the existing rules of international law, particularly the provisions of the Charter of the United Nations.

Paragraph 4

170. It was suggested that the relationship between countermeasures and ongoing negotiations should be considered further; it was an issue that could be revisited in connection with dispute-settlement provisions. The view was expressed that international jurisprudence had not established that countermeasures could not be resorted to until every effort had been made to achieve a negotiated solution; thus there was nothing to prevent States from taking immediate countermeasures in emergency situations. According to another view, paragraph 4 should be made applicable in all cases.

Paragraph 5

171. The suggestion was made that the word "and", connecting subparagraphs (a) and (b), should be replaced by "or", since the two conditions need not be fulfilled jointly.

172. Concerning subparagraph (b), the view was expressed that the requirement that countermeasures should be suspended if the dispute was submitted to arbitration or judicial settlement was consistent with the understanding that countermeasures must remain an instrument of last resort. It was observed that there was no room for countermeasures in cases where a mandatory dispute-settlement procedure existed, except where that procedure was obstructed by the other party and where countermeasures were urgent and necessary to protect the rights of the injured State, in the event that the dispute had not yet been submitted to an institution with the authority to make decisions that could protect such rights. As such, subparagraph (b) warranted being moved to a separate article immediately following draft article 50 (and making draft article 51, paragraph 2, redundant). It was also suggested that when countermeasures were suspended, those which were necessary for preserving the rights of the injured State could be maintained until the court or tribunal imposed provisional measures.

173. Others maintained that the duty not to take or to suspend countermeasures had no support under general international law, since it could discourage recourse to third-party dispute settlement and it failed to take account of the possibility that jurisdiction might be disputed.

Article 54
Countermeasures by States other than the injured State

174. The view was expressed that while draft article 54 was not without pertinence, since unlawful situations would not be left unresolved in cases where an injured State was not able to take countermeasures on its own, the risk of abuse could outweigh the benefits. It was also pointed out, however, that, as the draft stood, States other than the injured State were not entitled to take countermeasures, unless requested to do so by the injured State, for non-serious breaches of

erga omnes obligations. They might call for cessation and non-repetition under article 49, paragraph 2, but could do nothing to induce compliance. Doubt was expressed that that was the desired result.

175. Others expressed strong opposition to "collective countermeasures" and called for the deletion of draft article 54 as going beyond existing law. It was observed that the draft article, and particularly the phrase "countermeasures by States other than the injured State", which was deemed to be vague and imprecise, would introduce elements akin to "collective sanctions" or "collective intervention" into the regime of State responsibility. Such a development would run counter to the basic principle that countermeasures should and could be taken only by a country injured by an internationally wrongful act. Furthermore, "collective countermeasures" could provide a further pretext for power politics in international relations. It was also pointed out that the scope of the provision was too wide since an interested State, even if not injured itself, might take countermeasures without even consulting the affected States.

176. It was further pointed out that there were cases where such relations between States might also fall under the jurisdiction of international organizations responsible for security matters. Some speakers expressed difficulty in accepting the idea that the right to react could be delegated to a group of countries acting outside any institutional framework. It was suggested that collective countermeasures could be legitimate only in the context of intervention by the competent international or regional institutions, and that the situations envisaged in draft article 54 were adequately dealt with under Articles 39 to 41 of the Charter of the United Nations. Caution was also advised since draft article 54 could lead to the taking of multilateral or collective countermeasures simultaneously with other measures taken by the competent United Nations bodies. It was emphasized that the draft articles must not be allowed to create overlapping legal regimes that could weaken the Organization as a whole or marginalize the Security Council.

177. It was further queried how the principle of proportionality would operate in the situation envisaged under draft article 54, especially if "any" State was authorized to take countermeasures, as it deemed appropriate. It was suggested that "collective countermeasures" were inconsistent with the principle of proportionality enunciated in draft article 52, for they would become tougher when non-injured States joined in, with the undesirable consequence that countermeasures might greatly outweigh the extent of the injury. According to a further view, it was necessary to clarify whether the concept of proportionality applied to the measures employed by each State separately against the violator, or to all the countermeasures taken together. It was proposed that a provision should be added to article 53 requiring all States intending to take countermeasures to mutually agree on them before taking them.

Paragraph 1

178. It was suggested that countermeasures adopted by third (indirectly injured) States should be aimed primarily at the cessation of the internationally wrongful act rather than at obtaining reparation for the directly injured State.

Paragraph 2

179. In support of this paragraph, the view was expressed that while it would be unacceptable for any State to take countermeasures at the request of any injured State, the only exception concerned the acts referred to in article 41.

180. Others, while supporting the paragraph, pointed out that its consequences remained largely imprecise. For example, the issue of whether to authorize "any" State to take countermeasures against the author of a serious breach of the essential obligations owed to the international community needed to be studied further. It was further observed that if the notion of "interest of the beneficiaries" was meant to limit the scope of possible countermeasures, then paragraph 2 had to be interpreted cautiously. It was also proposed that paragraph 2 should be placed in a separate article, which would make it clear that countermeasures taken in response to a serious breach of an essential obligation owed to the international community should be coordinated by the United Nations.

181. Still others were of the view that the alleged right of any State to take countermeasures in the interest of the beneficiaries of the obligation breached went well beyond the progressive development of international law, and suggested that paragraph 2 should be deleted. It was remarked that determining whether a serious breach had occurred was a matter to be dealt with

under Chapter VII of the Charter of the United Nations. It was not appropriate to alter the principles of the Charter by allowing for collective countermeasures, undertaken unilaterally, without the involvement of the central body of the international community, leaving it up to the individual State to decide whether there had been a serious breach, what sort of countermeasure should be applied and under what circumstances they should be lifted. There was also a danger that disproportionate unilateral acts, which in reality were not justified by the interest they sought to protect, might be disguised as countermeasures, which would threaten the credibility of the concept. It was further pointed out that even accepting the proposition, on the basis of the *Barcelona Traction* case, that States at large had a legal interest in respect of violations of certain obligations, it did not necessarily follow that all States could vindicate those interests in the same way as directly injured States. As they stood, the proposals were potentially highly destabilizing of treaty relations. It was questioned whether a State should really be able to contravene any of its treaties, including, for example, those of a technical nature, in response to any serious breach by another State of any *erga omnes* obligations. The view was also expressed that draft article 54, paragraph 2, created the impression that in case of a breach under article 41, any State could take countermeasures without first having made requests in accordance with article 49, paragraph 2 (b). While such an interpretation could be excluded by article 53, paragraph 1, the connection needed to be made explicit.

Paragraph 3

182. While paragraph 3 was described as being sufficiently flexible in the light of the rapid developments in international law and in the interests of proportionality, others observed that the obligation to cooperate was poorly defined and would cast doubt on the legality of the actions of States and fail to contain countermeasures within their legal framework.

Part Four. General provisions

183. There was support for including all the general provisions in Part Four and for the non-inclusion of the saving clause on diplomatic immunity, pending a consensus on its wording. There was also support for excluding proposed draft article B (A/CN.4/507/Add.4, para. 429) since the content of international obligations of a State was a complex issue which could not be covered in so brief a provision.

184. Noting the close relationship between the law of treaties, especially articles 60 and 73 of the 1969 Vienna Convention, and the law on State responsibility as well as the need to avoid blurring the distinction between them with regard to breaches of contractual obligations, it was suggested that a reference to the parallelism between the Convention and the draft articles should be maintained through a "non-prejudice" clause.

Article 56 [37]
Lex specialis

185. There was support for the saving clause as a restatement of a well-established principle of international law. However, it was also remarked that draft article 56 did not provide a sufficient safeguard with respect to draft articles 49 and 54.

186. There were also several suggestions, as follows: it would be helpful to state explicitly that the draft articles were residual in character and would come into play only if and to the extent that the primary rule or special regime agreed to by the State concerned had not specified the consequences of a breach of obligations; the article should be clarified because it appeared to preclude even residual application of the draft articles in cases where the special rules of international law proved inadequate and such a position would excessively restrict implementation of the new instrument; the article should be drafted in positive terms so that its application was "without prejudice" to the application of other special rules of international law and should also contain a saving clause to the effect that specific regimes should not take precedence over peremptory norms of international law; the term *lex specialis* should be replaced by the concept of "special regimes", which was widely accepted in international law, since the article dealt not with norms or acts, but specifically with a body of norms which constituted a regime of responsibility; and the words "and principles" should be added after "rules" in draft article 56.

Article 57
Responsibility of or for the conduct of an international organization

187. The saving clause was considered acceptable.

Article 58
Individual responsibility

188. The saving clause was considered acceptable.

Article 59 [39]
Relation to the Charter of the United Nations

189. This article was acceptable to some delegations. It was remarked that the countermeasures regime should not be interpreted as an encroachment on the authority of the Security Council under Chapter VII of the Charter of the United Nations and that draft article 59 provided adequate safeguards in that respect.

190. The following concerns were also expressed: article 59 was ambiguous since it was unclear whether it referred to the obligation to refrain from the threat or use of force or to the competence of the organs of the United Nations to deal with breaches of an obligation and, in the latter case, whether it was attempting to establish the United Nations prior right or parallel right to act; the text did not specify whether a Security Council objection to countermeasures as a threat to peace should prevail; and the article should make it clear that countermeasures taken within the United Nations system must also be subject to the rule of proportionality. It was suggested that the overlap between a breach of multilateral obligations and the legal consequences of wrongful acts, and their relationship with the Charter of the United Nations, called for in-depth consideration.

B. Diplomatic protection

1. General comments

191. It was generally agreed that diplomatic protection had a solid basis in customary international law and was a useful instrument for the peaceful settlement of disputes between States regarding violations of international law affecting their nationals and served as a valuable complement to the existing fragmented system of human rights protection. It was further agreed that the Commission had sufficient State practice on which to draw in codifying the topic. It was suggested that in general, the Commission's work on diplomatic protection should be limited to codifying State practice and therefore to customary law. It was further stated that the topic should remain part of general international law, despite the growing capacity of individuals to enforce their rights, such as human rights and the protection of investments, at the international level. There were still cases in which individuals had to have recourse to their own States, rather than international bodies, for the protection of their rights.

192. Diplomatic protection was viewed as one of the oldest institutions in international law, and still among the most controversial. The difficulty for the Special Rapporteur, and for the Commission, in dealing with the topic was considered to be in how to strike a proper balance between the codification of the general rules of international law in that area and its progressive development in accordance with current trends. In formulating the draft articles, it would be prudent to take a conservative approach, to reflect the line taken by Governments.

193. The topic of diplomatic protection involved a series of complex theoretical and practical questions and had a bearing on inter-State relations. So long as the State remained the dominant actor in international relations, diplomatic protection would, despite the increased efforts by the international community to protect human rights, continue to be the most important remedy for protecting aliens' rights. In terms of international law, it was a matter of inter-State relations. A State was entitled to protect the legitimate rights and interests of its nationals abroad. Whether and how diplomatic protection should be exercised in a specific case fell within the State's discretion. In order to prevent power politics and the abuse of diplomatic protection, therefore, the right to diplomatic protection should be limited.

194. One of the most controversial points relating to the topic of diplomatic protection was considered to be its relationship to human rights protection. It was accepted that a State had the right to ensure that its nationals were treated in accordance with international standards and human rights norms. As a condition for the exercise of diplomatic protection, the individual must have suffered an injury and been unable to obtain satisfaction through local remedies. On the other hand, in the case of gross violations of human rights

guaranteed by *erga omnes* norms, other members of the international community were also entitled to act, and that was the justification for paragraph 2 of draft article 1.

195. While sharing the Special Rapporteur's enthusiasm for the promotion and protection of human rights insofar as their cause could be served through the appropriate use of diplomatic protection, the view was expressed that it was neither necessary nor desirable to change the very basis or character of diplomatic protection to serve the broader interests of individual human rights. The Commission's work should be limited to existing precedents and practice. Moreover, a State's action in pursuance of diplomatic protection for its nationals should be limited to representation, negotiation or even judicial proceedings. It should not include reprisals, retortion, severance of diplomatic relations or economic sanctions. The protection of human rights under *erga omnes* obligations was also not a proper part of the topic of diplomatic protection. In such cases, a State's right to intervene was subject to the law on State responsibility, which was under separate consideration and in any case was concerned with the broader issue of ensuring respect for obligations owed to the entire international community. It was a different matter altogether and should not be confused with the topic of diplomatic protection.

196. Again on the issue of the relationship between diplomatic protection and human rights, it was further stressed that if the two subjects were confused, more problems might be raised than solved. Any State had the right to act and might even have a duty to act when faced with human rights violations, whether the persons affected were its own nationals, nationals of the wrongdoing State or nationals of a third State. However, diplomatic protection should not serve as the instrument for such action because it was not the rights and interests of nationals alone that were to be defended, but those of the international community as a whole.

197. It was noted that the Commission had not included a reference to denial of justice and did not intend to do so on the grounds that it pertained to primary rules. That argument, according to one view, violated a basic principle of diplomatic protection: for an injury to be attributable to a State, a denial of justice had to have occurred, in the sense that there could be no further possibility of obtaining reparation or satisfaction from the State to which the act was attributable. The diplomatic protection procedure could be started only once all local remedies had been exhausted. Primary and secondary rules were not set in stone and the distinction between them was not absolutely clear-cut. Exhaustion of local remedies and denial of justice were principles that could not be omitted from a draft on such an important issue. However, according to another view it was preferable that there should be no reference to denial of justice, since the issue would involve consideration of primary rules. The question could be revisited in relation to the rule of exhaustion of local remedies.

198. It was further noted that no consideration seemed to have been given to the principle of the prior renunciation of any claim for diplomatic protection. In both their constitutions and their practice, some countries had cases in which non-nationals undertook activities in the territory of a State under the conditions prevailing in that State's legislation, on the understanding that they would be treated as nationals and would not seek diplomatic protection from their State of nationality in areas relating to the activities concerned. It would be inappropriate for a non-national to call for diplomatic protection in such cases. State responsibility and diplomatic protection remained closely linked as pillars of international law. The Commission should therefore assemble all the pieces of the puzzle, codifying State practice and, where necessary, introducing new rules reflecting the progressive development of international law.

199. According to the same view, while it was right to proceed with the codification of secondary rules on diplomatic protection, which simply constituted a special case within the larger framework of State responsibility, the fact remained that such protection was a discretionary right belonging to the State concerned. Diplomatic protection was a useful remedy whereby States could protect their nationals abroad in cases where other, more recently established and theoretically more satisfactory means were inapplicable. Attention should be paid in particular to the system of international human rights protection or the various mechanisms for investment protection, which were based on well-established principles deriving from the rules of diplomatic protection. A happy medium should therefore be sought between two extreme points of view: the idea that recent developments in international law had made diplomatic

protection obsolete, as against the idea that diplomatic protection was a more effective way of protecting the individual. Both might be predicated on the laudable desire to promote the protection of the individual, but both were extremely simplistic. The advantages and disadvantages of both courses of action — and their widely differing legal, political and moral bases — should be recognized, without overlooking the major differences between their application at the regional level. Regional mechanisms were complementary, not mutually exclusive, yet it would be a mistake to overburden them with excessively high expectations.

200. It was stated that one point worth considering was the issue of diplomatic protection for legal persons. International practice allowed States to institute claims for injuries suffered by their businesses abroad whether or not it was accepted that legal persons possessed a "nationality" and that position had been accepted in doctrine and jurisprudence. The draft articles therefore could and should deal with the issue, while bearing in mind the necessary differences between legal and natural persons in terms of diplomatic protection. It might clarify the issue if the Commission concentrated for the time being on the protection of natural persons before tackling that of legal persons.

2. Comments on specific articles

Article 1

201. Many delegations considered article 1 somewhat vague. Paragraph 1 referred to the first of the two preconditions for the exercise of diplomatic protection: that relating to the existence of an injury caused to a national by reason of an internationally wrongful act attributable to a State. In addition to raising certain drafting difficulties, the paragraph was inappropriate because it was incomplete. If it was retained, it should recall the two conditions for the exercise of diplomatic protection. In point of fact, the second condition, namely the exhaustion of domestic remedies, was just as important as the first. Hence, the two conditions should be recalled at the outset and then dealt with in greater detail in the rest of the draft articles by specific provisions, and the customary law requirement of the exhaustion of local remedies, confirmed by the International Court of Justice in the *Interhandel* case, should be included in the draft articles. With regard to the second condition, it deserved to be studied in the light of the development of international law and of the possibilities henceforth available to individuals who had sustained an injury. The Commission should therefore concern itself with the question whether recourse to a non-national jurisdiction accessible to all could or could not be considered a "domestic remedy", even if a purely literal interpretation did not allow that question to be answered in the affirmative. Paragraph 1 should reflect the fundamentals of the principle of diplomatic protection which were widely accepted by States and already formed part of customary international law. It was further noted that the use of the term "omission" might cause confusion.

202. It was stated that the word "action" seemed ambiguous and disputable. Diplomatic protection was not an action as such. It was the setting in motion of a process by which the claim of a natural or legal person was transformed into a legal relationship between two States. That was one of the methods of entailing the responsibility of the State to which the injury was attributable. Paragraph 2, which stated as a principle that diplomatic protection could, in certain "exceptional circumstances", be extended to non-nationals, raised serious difficulties. Quite apart from the fact that it was premature to deal with that very controversial question in article 1, what the Special Rapporteur was really proposing — diplomatic protection for refugees and stateless persons — was absolutely unsupported by State practice and was even contrary to certain international conventions.

203. It was also commented that option one, proposed for consideration by the Drafting Committee on the basis of the informal consultations, appeared to be the best way of reflecting existing State practice. The replacement of the word "action" in paragraph 1, as suggested by the Special Rapporteur, by a more descriptive formula, such as "diplomatic action" or "judicial proceedings", also appeared to be justified. It was worth recalling that the Permanent Court of International Justice, in the *Mavrommatis Palestine Concessions* case, had stated that the proper way for a State to exercise diplomatic protection was by resorting to diplomatic action or international judicial proceedings. It was also suggested that the words "action taken by a State", which seemed to be controversial, should be replaced by the words "procedural remedy or modality undertaken in accordance with international law by a State". The same article should mention the aim or purpose of diplomatic protection. Although diplomatic protection

was a sovereign prerogative of a State, exercised at the latter's discretion, its goal must be to ensure that the internationally wrongful act ceased and that the injury was repaired.

Article 2

204. General support was expressed for the deletion of article 2, which was considered outside the scope of the topic. Article 2 set forth the principle that the threat or use of force was prohibited as a means of diplomatic protection, except in certain cases listed by the Special Rapporteur. Diplomatic protection was the initiation of a procedure for the peaceful settlement of a dispute, in order to protect the rights or the property of a national who had suffered injury in another State. That procedure had absolutely nothing to do with the question of the use of force. Article 2 should be dealt with in relation to humanitarian intervention, an issue which was being considered in other United Nations forums. It was noted that while exceptions to the prohibition of the use of force could be permitted only on legitimate grounds recognized by international law, it was not appropriate to have them discussed in the context of diplomatic protection. Diplomatic protection should be viewed as the initiation of a procedure for the peaceful settlement of a dispute. Article 2, paragraph 4, of the Charter of the United Nations was categorical in rejecting the threat or use of force, and no exceptions should be formulated that might cast doubt on that basic principle of international law. In addition, it was stated that diplomatic protection was fundamentally incompatible with the right to use force in defence of the rights of nationals. The two concepts could not coexist and could not even be integrated.

205. It was stressed again that the use of force in the context of diplomatic protection was highly controversial and not part of the topic of diplomatic protection. Any rule permitting or justifying the use of force in that context could easily prove dangerous. States should not be given a legal basis to use force other than in self-defence, as provided for in Article 51 of the Charter of the United Nations. A suggestion was made to add the words "short of use of force" in draft article 1, paragraph 1, after the words "diplomatic protection means action".

206. Some delegations, however, found it useful to have article 2 explicitly prohibit the use of force or limit it to highly exceptional circumstances in which the lives of nationals were in immediate danger.

Article 3

207. It was generally agreed that the State had discretionary competence in exercising diplomatic protection and that such discretionary power should not be confined or limited. Furthermore, in order to exercise that right in any specific case, the State took into account not only the interest of its national who had been injured by a wrongful act of another State, but also a certain number of elements related to the conduct of foreign policy. It should therefore be left to the State to determine when to exercise diplomatic protection. The comment was made that although the right of diplomatic protection belonged essentially to the State, to be exercised at its discretion, it should serve the interests of nationals as far as possible. Concern for the rights of the individual should not, however, be stretched to the point where it was obligatory for the State of nationality to espouse the claim in question despite political or other sensitivities.

208. It was also noted that the system of diplomatic protection and the system of international human rights protection should remain distinct and function side by side, although they might occasionally overlap. The discretionary power of the State to exercise its right was established in customary law and should not in principle preclude the possibility of enacting internal legislation making it an obligation of the State. Since the definition in draft article 1 had already mentioned that the injury to the person must have been caused by an internationally wrongful act, the international nature of the wrongful act was implicit in draft article 3 and did not have to be expressly stated.

209. A view was also expressed that while article 3 reflected the international practice in defining diplomatic protection as a discretionary power of the State, one could not deny the growing trend in domestic law towards limiting the discretionary element of such a prerogative. While not advocating the adoption of draft article 4, it was suggested that at the level of international law, greater attention should be focused on the way in which diplomatic protection operated and on the effect of the relationship between the State of the injured individual and the State which had committed the internationally wrongful act, and less on the nature of the right in itself. Thus according to one view, for that reason, the phrase declaring that the State of nationality had discretion in the exercise of diplomatic protection should not be retained in draft article 3.

Article 4

210. General support was expressed for the deletion of article 4. The article, which stated as a principle that, in certain circumstances and "if the injury results from a grave breach of a *jus cogens* norm", the State had "a legal duty" to exercise diplomatic protection was considered a proposal *de lege ferenda*, since it was not supported by State practice. Like others, the article reflected the overriding influence of what could be called a "human rights logic" and it was not deemed appropriate for the Commission to include that type of logic in its study. It was emphasized that diplomatic protection should continue to be conceptualized as a right rather than a duty of the State. Although that right derived from a prior violation by another State of the rights or interests of individuals, the distinction, artificial though it might be, between the right of the State and the right of the individual should be maintained. Even States that had, in their domestic legislation, accorded their nationals the right to diplomatic protection reserved the right to withhold it when the vital interests of the State were involved. Domestic laws providing for compensation to individuals in such cases were not in contradiction with the discretionary nature of the State's right to exercise diplomatic protection at the international level. It was further noted that the question whether a State should provide diplomatic protection was a matter of internal, not international law. Moreover, if it decided not to do so there was no violation of human rights. The attempt in draft article 4 to protect human rights was unnecessary. Human rights had not yet developed sufficiently in international law, through *opinio juris* and State practice, to warrant codification of an individual right to diplomatic protection.

211. It was further observed that article 4, which was intended to clarify the obligation of a State to provide diplomatic protection, had actually confused the situation further by confining the obligation to grave breaches of norms of *jus cogens*. Such breaches gave rise to State responsibility, not to a duty to provide diplomatic protection, so paragraph 2 of draft article 4 became meaningless. Article 4, paragraph 1, raised two issues: first, it provided that a State had a "legal duty", rather than a discretionary right, to extend diplomatic protection to its nationals abroad; and second, it referred to *jus cogens*, which had not been clearly defined under international law. There was a need for more State practice and *opinio juris* before the issue could be considered by the Commission.

212. The view which was generally shared was that since diplomatic protection was a right accorded not to an individual but to a State under international law, a State had full discretion to decide whether or not to claim the right of diplomatic protection on behalf of its nationals, and consequently article 4 should be deleted.

Article 5

213. It was noted that, according to article 5, the State of nationality was the State whose nationality the individual sought to be protected had "acquired by birth, descent or by bona fide naturalization". The view was expressed that the actual principle on which the article was based posed some problems. The Commission was not considering the acquisition of nationality, but rather diplomatic protection, which could only be exercised on behalf of a national. What was under consideration was not so much the circumstances in which a State could grant nationality, a matter that depended on internal law, but rather the right of a State to protect one of its nationals. It was considered inappropriate for the Commission to try, in the context of its study, to define the nationality link of natural or legal persons or the conditions for granting nationality. However, it would be useful for it to try to define the conditions for opposability of nationality vis-à-vis another State in the context of diplomatic protection. It was generally agreed that the topic should not deal with the question of acquisition of nationality. Consequently a suggestion was made to reword article 5 to read: "For the purposes of diplomatic protection of natural persons, the 'State of nationality' means the State whose nationality the individual claiming diplomatic protection lawfully possesses." The International Court of Justice had already considered the question in 1955, but had done so in a very general manner, and there was no consensus concerning the jurisprudence.

214. The comment was made that the provisions of draft article 5 would not affect States' right to establish their own conditions for the granting of nationality and that States would exercise diplomatic protection only on behalf of their own nationals as defined under internal legislation. Moreover, the term "bona fide" was too vague and might conflict with the concept of an effective link between the individual and the State of nationality; the result might be to leave an injured

person without diplomatic protection if the State with which he had an effective link was one whose nationality he was deemed to have acquired in bad faith. Further information on the matter would be useful.

215. It was stated that international jurisprudence and State practice indicated the importance of determining nationality based on the evidence of an effective or genuine link together with such criteria as birth, descent or bona fide naturalization. Hence, habitual residence should not be adopted as a condition for the exercise of diplomatic protection.

216. It was further noted that the issue of effective link should be opposable only between two or more States of which an individual was a national. No other State should be entitled to invoke the effective link concept in order to reject the procedural endeavours of a State of nationality to protect its national, provided only that the nationality had been legally granted. Since a State's right to grant nationality was virtually absolute, the main clause of draft article 5 should read "the State of nationality means the State whose nationality the individual sought to be protected has acquired in accordance with its national laws".

Article 6

217. It was stated that diplomatic protection could be exercised only when the State extending protection could prove that the person concerned was its national. That prerequisite was clear-cut in theory, but in practice its application was complicated by the fact that a person might possess two or more nationalities or be stateless. In the former case, it could be asked which of the States of nationality was entitled to put forward a claim against a third State and whether one State of nationality could put forward a claim against another State of nationality. A number of delegations, while supporting the core of article 6, had difficulties with its formulation. The principle set forth in the article was considered in contradiction with article 4 of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, according to which "a State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses". It was found more preferable for the Commission to restrict itself to the principle established in that article, which was generally acceptable.

218. With respect to whether a State could exercise diplomatic protection on behalf of one of its nationals who maintained an effective link with that State while maintaining weaker links with another State of which the person was also a national, that situation met the requirement that the person must have an effective link with the State exercising diplomatic protection, as well as the criterion of stronger de facto linkage. Thus, the weaker link that such a person might have with another State was insufficient for the exercise, by that State, of diplomatic protection, and therefore would not result in a situation where more than one State could exercise such protection on behalf of the same person. With respect to whether a State could protect one of its nationals with dual nationality against a third State of which the injured person was not a national, without having to prove that there was an effective link between it and that person, it should be assumed, in principle, that either of the two States of nationality could exercise such protection without having to prove such linkage. Such an assumption could be rebutted, but only when the third State impugned the existence of an effective link between the person and the State exercising diplomatic protection.

219. It was commented that in the light of State practice and the relevant provisions of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, a person having two or more nationalities might be regarded as its national by each of the States of nationality. They were therefore both entitled to claim on his or her behalf against the injuring State and the latter was not entitled to play off one State against the other. With regard to the question whether a State of nationality could put forward a claim against another State of nationality, for some delegations, the answer was in the negative, unless otherwise agreed. As long as the individual concerned had suffered injury within the territory of the State of which he or she was a national, there was no scope for the exercise of diplomatic protection by any State, including the State of dominant or effective nationality. Any problems suffered by individuals in that regard were the natural consequences of the benefits which they would otherwise enjoy from holding dual or multiple nationality. The exercise of diplomatic protection by one State of nationality against another such State lacked sufficient support in customary international law to justify its codification. Accordingly, some delegations believed that the Commission's question (d) should be answered in the

affirmative, although it understood that on the basis of draft article 7 there might be competition with another State of nationality wishing to exercise diplomatic protection.

220. A comment was made that while the Special Rapporteur had cited many examples, mainly judicial decisions, in which the development and application of the principle of effective or dominant nationality in cases of multiple nationality had taken place, it appeared premature to state that the principle embodied in draft article 6 reflected the current position in customary international law which accorded legal protection to individuals even against the State of which they were nationals. It was also remarked that dual or multiple nationality was a fact of international life, even if not all States recognized it. The 1997 European Convention on Nationality accepted multiple nationality on condition that the provisions relating to multiple nationality did not affect the rules of international law concerning diplomatic or consular protection by a State party in favour of one of its nationals who simultaneously possessed another nationality. Bearing in mind the consequences of mass migrations, the process of globalization and trends in the implementation of the policy of "open borders", the position of persons with dual or multiple nationality should be further elaborated in respect of diplomatic protection. It would be desirable to have a more precise definition of the distinction between an effective link and a weak link between a national and his/her State.

221. The view was expressed that although draft article 6 was fully in the spirit of the *Nottebohm* case and of current international jurisprudence, the underlying principle might cause problems of application. It was difficult to imagine a situation in which the dominancy of nationality of the claimant State was so indisputable that even the respondent State would not oppose its exercise of diplomatic protection. The statement that "any doubt about the existence of effective or dominant nationality between the claimant State and the respondent State should be resolved in favour of the respondent State" was hardly satisfactory and, in fact, cast further doubt on the usefulness of the provision.

222. It was stated that the decisions of the Iran-United States Claims Tribunal, which were recent sources for the evolution of the rules applying to diplomatic protection, did not support the proposition of the exercise of diplomatic protection of dual nationals against their own State of nationality. In cases of dual nationality, most of the decisions of the Tribunal rested on treaty interpretation rather than diplomatic protection, and it drew a clear distinction between the two. In case No. 18 it had stated that the applicability of article 4 of the 1930 Hague Convention to the claims of dual nationals was debatable because, under its own terms, it applied only to diplomatic protection by a State. As the Special Rapporteur explained in his report, there were few records of current State practice concerning diplomatic protection of dual nationals against another State of which they were also nationals. In the same approach, another view was expressed to the effect that article 6 was unacceptable: regardless of the existence of an effective link between the individual and the State, no State would willingly grant another the right to intervene in its affairs on behalf of an individual whom it considered one of its own nationals. However, dual nationals should be entitled to consular protection from one State of nationality against another State of nationality under certain circumstances, such as cases of serious, repeated violations of the fundamental principles of international law.

223. Another view was expressed to the effect that customary international law called for a link of nationality with the claimant State, a requirement which raised difficulty in the event of dual or multiple nationality if the respondent State was the State of the second nationality. The result of applying the rule in article 4 of the 1930 Hague Convention could be to deprive an individual of diplomatic protection altogether. In addition, since that time the principle of effective or dominant nationality had emerged, as found in case No. 18 of the Iran-United States Claims Tribunal and in the *Mergé* case decided by the Italian-United States Conciliation Commission. On that basis, draft article 6 incorporated the principle of effective and dominant nationality and set aside the principle of non-responsibility, an approach which was acceptable.

224. According to one view, the term "dominant nationality" was preferable to "effective nationality" in situations of dual nationality. The Commission also might consider including a second paragraph allowing, exceptionally, a State of nationality to exercise diplomatic protection against a State of which the injured person possessed dominant nationality if that State violated the human rights or fundamental

freedoms of that individual or failed to ensure appropriate protection in the case of such violation.

Article 7

225. Article 7 was considered to reflect the rule enshrined in article 5 of the 1930 Hague Convention and subsequent jurisprudence, namely that the State of an individual's dominant nationality could exercise diplomatic protection on his or her behalf and it did not go beyond what was already said in draft article 5. With regard to the joint exercise of diplomatic protection by two or more States of nationality, it was pointed out that the respondent State could seek implementation of the dominant nationality principle and deny one of the claimant States the right to diplomatic protection. It was noted that an appropriate formula should be found to avoid the difficulties that might arise if one of those States were to cease its efforts to exercise diplomatic protection or declare itself satisfied with the reaction of the respondent State, while the other State or States continued to act. A solution might be found with reference to the purpose of diplomatic protection.

226. A view was also expressed that while there was no objection in principle to multiple sponsorship of a diplomatic claim irrespective of the principle of dominant or effective nationality, it was necessary to guard against excessive international pressure being put on a State on account of injury suffered by a foreign national within its territory.

227. On the other hand, another view was expressed according to which article 7 was found problematic: dual or multiple nationals should not be entitled to diplomatic protection against third States unless they had an effective link with the State exercising such protection. There was no reason to abandon the principle, established in the *Nottebohm* case, that the claimant's nationality must be opposable to the respondent State. Thus, it would be impossible for two or more States of nationality to jointly exercise diplomatic protection.

Article 8

228. A number of delegations expressed difficulties with article 8. The view was expressed that the suggestion that diplomatic protection should be available to refugees was based on the international human rights regime, which granted recognition to individuals on the basis of their personhood, rather than their national affiliation. That represented a shift in the criteria applied in customary practice of diplomatic protection; eventually the logic of personhood could supersede the logic of nationality as the basis for diplomatic protection. However, it was doubtful whether that was a desirable outcome. The Special Rapporteur had excluded consideration of the notion that international organizations mandated to protect the welfare of refugees should provide protection, although that option offered an attractive solution to the potential disincentive that draft article 8 currently posed to States hosting large refugee populations. It was a matter of particular concern that the wording of the draft article established habitual residence as a basis for a request for diplomatic protection rather than the traditional criterion of nationality. That could add to the heavy burden already borne by refugee-hosting countries. It would therefore be preferable to extend the classic "functional" concept whereby international organizations had extended protection to their employees and, in the case of the United Nations High Commissioner for Refugees, to refugees. The expression "when that person is ordinarily a legal resident", in relation to a stateless person or refugee, in draft article 8 also required clarification. In instances where refugees entered a country as part of an influx and not in an orderly fashion and were then permitted to remain over an extended period of time, the question of the legality of their residence required further elaboration. Lastly, that approach indicated a potential confusion between diplomatic protection and the law of immunities and privileges. The Commission should clarify the matter in its commentary.

229. In the same context, it was noted that neither the 1951 Convention relating to the Status of Refugees nor the 1961 Convention on the Reduction of Statelessness required the State providing refuge to exercise protection on behalf of stateless persons and refugees. The administrative assistance mentioned by the Special Rapporteur in paragraph 178 of his report was irrelevant to the issue of diplomatic protection. Moreover, as the Special Rapporteur stated in paragraph 183 of his report, the right would rarely be exercised in respect of refugees and stateless persons. It was difficult to envisage the circumstances under which such protection must be exercised. Surely it could not be exercised against the State of nationality. In respect of the exercise of such protection against a

third State, the continued treatment of the individual as a refugee in the territory in which the injury had been suffered would presumably prevent the State of habitual residence from taking up the claims involved. It might be useful to compile data concerning actual situations in which refugees would require diplomatic protection from such States over and above the functions of the United Nations High Commissioner for Refugees. Concern was expressed that, given the vast numbers of refugees existing in the world, it was obvious that legal arrangements were needed for their protection, but because the political circumstances varied, special arrangements were required in each case. The problem could not be solved by general and residual rules and could be more appropriately addressed by other bodies. The article was viewed as an exercise of progressive development of international law on which the Commission should carefully proceed.

230. On the other hand, some other delegations welcomed article 8. It was noted that the formulation of draft article 8 dealing with diplomatic protection of stateless persons or refugees by the State of residence should meet the concerns expressed by some members of the Commission since it followed the approach that the exercise of diplomatic protection was a prerogative of States. The provision represented an instance of the development of international law as warranted by contemporary international law, which could not be indifferent to the plight of refugees and stateless persons. It was observed that a State should be entitled to exercise diplomatic protection where there was no effective link between the national and the State, provided that the national had no effective link with the respondent State. In principle, States were entitled to protect their nationals and should not be obliged to prove their right to do so except in the specific cases mentioned in draft articles 6 and 8. Similarly, in cases of dual nationality, both States were entitled to exercise diplomatic protection either jointly or separately against third States. In cases where the link to both States of nationality was weak and the person was a legal resident of the respondent State, the bona fide acquisition of nationality should be proved.

231. It was further noted that the Commission's approach accorded with developments in the field of human rights, but it must be made clear that there was no duty on the State of residence to exercise such protection, since it might deter States from providing asylum to refugees and stateless persons. It was also pointed out that a person who had become a legal resident could no longer be considered a refugee and could therefore claim diplomatic protection from the host State; if habitual residence was included among the criteria for nationality, habitual residents of the host State would also be eligible for diplomatic protection. However, it might be useful to add a statement that the United Nations High Commissioner for Refugees was authorized to protect stateless persons and refugees who lacked such links. It was also suggested that draft article 8 should be divided into two parts dealing with stateless persons and refugees, respectively.

C. Unilateral acts of States

232. Delegations welcomed the substantial progress made on the topic of unilateral acts of States, a topic which represented hitherto uncharted terrain. The reports of the Special Rapporteur, it was said, had greatly assisted the codification and progressive development of the rules of international law governing the topic. Although the topic was a difficult one, progress was possible, it was said, if States displayed the political will to agree on a text which would provide the required certainty in inter-State relations.

233. The importance and relevance of the topic was stressed by several delegations. The area, it was said, was more limited in scope than treaty law, but its codification and progressive development might promote the stability of international relations. Although State practice and jurisprudence were very poorly developed, the topic was extremely important and the Commission must pay particular heed to it. It was stressed that, notwithstanding the diversity and complexity of the topic, the matter was an eminently fit subject for study. It was important to determine whether any uniform or common features could be identified from the different types of unilateral acts which occurred frequently in State practice. Among the core issues of the topic which deserved in-depth consideration, mention was made of intentionality, the legal effects of unilateral acts and their compatibility with international law.

234. On the other hand, some other delegations, for various reasons, expressed doubts about the topic. Thus, in one view, it was doubtful that the topic was ripe for codification given the lack of sufficient State practice. It was also noted in this connection that the

replies of States to the Commission's questionnaire had been very sparse. Doubts were also expressed as to whether the topic was suitable for codification in view of the great diversity of unilateral acts in State practice and, consequently, as to whether the attempt to subject unilateral acts to a single body of rules was well-founded or even helpful. Furthermore, in one view, very few unilateral promises made by States were intended to be legally binding. To these delegations, the Commission should give consideration to the future of the topic as a whole.

235. Several delegations stressed the need to have an accurate picture of State practice in the area of unilateral acts in order for the Commission to be in a better position to proceed with the codification and progressive development of the topic. It was noted in this connection that State practice on unilateral acts was far from abundant, and in many cases the binding nature of the acts was disputed. Moreover, most constitutions were silent on the domestic requirements for a unilateral assumption of legal obligations, in contrast to the full regulation given to the competence to enter into treaties. There was also a certain dearth of judicial decisions on the topic. The above, it was said, made it even more important that States should be more forthcoming with evidence of their State practice, in particular by answering the questionnaire and request for materials sent to them by the Secretariat. Otherwise, it was pointed out, it would be difficult for the Special Rapporteur to assess the expectations of States and the subject might turn into one in which progressive development based on general principles of law could play a more important role than codification.

236. Several delegations supported a flexible approach to the relationship between the rules to be drafted on unilateral acts and the provisions of the 1969 Vienna Convention on the Law of Treaties. They agreed with the point of view of the Special Rapporteur that the Convention could constitute an appropriate point of reference and could provide guidance in formulating the legal regime governing unilateral acts. Although not all the rules of the Convention were necessarily applicable, some were, since treaties and unilateral acts both fell within the category of legal acts. In one view, some of the provisions of the Vienna Convention, particularly those concerning the capacity of States, persons representing the State, non-retroactivity, invalidity and, to some extent, termination and suspension, could apply mutatis mutandis to the formulation of unilateral acts. In another view, it was essential to carry out a full examination of all the ingredients of the Vienna Convention (conclusion of treaties, interpretation, application and termination) before it could be determined whether an analogous application to unilateral acts was not only possible but also necessary. Although the Vienna Convention was a useful frame of reference for an analysis of the rules governing unilateral acts, it should not be reproduced word for word but used very carefully as a source of inspiration. Subject to that caveat, the rules of interpretation and the rules for termination of a unilateral act might be derived from the Vienna Convention and applied by analogy. Another view pointed out that the following articles of the Vienna Convention might, with some care and flexibility, be adapted to form new draft articles on unilateral acts: articles 4, 27, 31, paragraph 1, 39, 43, 45, 46, 61 to 65 and 69 to 72.

237. Some observations were made concerning the scope of the draft articles on unilateral acts.

238. Some delegations, while agreeing that at the current stage of the Commission's work, unilateral acts of international organizations need not be covered by the draft articles being elaborated, also felt that since unilateral acts of international organizations were gaining in significance, it would be advisable for the Commission to address that issue as well, after it had dealt with the unilateral acts of States. In the view of those delegations, there was a clear analogy with the relationship between the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Even though unilateral acts of international organizations presented different aspects and problems, there was no reason to avoid consideration of them. In their view, this new topic should be placed on the Commission's agenda. Those organizations should be able to enter into unilateral commitments with States and other international organizations, and the issues raised by such acts must therefore be addressed mutatis mutandis in the light of the 1986 Convention.

239. It was noted by some delegations that the Commission appeared to have leaned towards excluding from the scope of the topic unilateral acts subject to special legal regimes, such as those based on conventional law. In this connection one view was expressed that it would be advisable to add a new

article providing that the draft articles did not apply to dependent unilateral acts or, conversely, applied only to autonomous acts. Otherwise, it might be assumed that the draft articles covered unilateral acts that depended on a treaty, such as ratifications or reservations. The article, following the example of article 3 (b) of the Vienna Convention on the Law of Treaties, might provide that nothing prevented the provisions of the draft articles from applying to dependent unilateral acts.

240. Some delegations suggested that there be included within the scope of the topic unilateral acts of States deriving from the promulgation of internal legislation which had extraterritorial effects on other States and affected international trade and financial relations between States and their nationals. It was noted in that connection that the General Assembly resolution entitled "Elimination of unilateral extraterritorial coercive economic compulsion" reflected the concern of the international community with that kind of unilateral act.

241. A view was expressed that the deletion of former draft article 1, entitled "Scope of the present draft articles", was to be welcomed. That draft article had stated that "the present draft articles apply to unilateral acts formulated by States, which have international legal effects". According to that view, the drafting of the article raised many difficulties, as it covered only legal acts, even though political acts likewise could produce legal effects, and disregarded the intention of the author of the act, a particularly fundamental element, simply emphasizing instead the consequences of the act.

242. Some delegations addressed in particular points (a), (b) and (c) concerning further work on the topic, which are reflected in paragraph 621 of the Commission's report.

243. A number of delegations expressed their support for point (a), according to which the kind of unilateral acts with which the topic should be concerned were non-dependent acts in the sense that the legal effects they produced were not predetermined by conventional or customary law but were established, as to their nature and extent, by the will of the author State. It was noted in that connection that if a kind of unilateral act was governed by conventional or special customary law it should be beyond the scope of the draft articles, on the principle *lex specialis derogat legi generali*. It was also noted, however, that not too much should be made of the distinction since some rules in such areas could be relevant. A unilateral act could not exist in a legal vacuum; it derived its validity from its inclusion in the international legal order. It was also pointed out that non-dependant acts could not be legally effective if there was no reaction on the part of other States; thus, a unilateral declaration on continuity in State succession did not produce legal effect unless it was accepted by other States.

244. Some delegations supported point (b), according to which the draft articles could be structured around a distinction between general rules which might be applicable to all unilateral acts and specific rules applicable to individual categories of unilateral acts. Some of those delegations provided examples of subject matters fit for general rules and other subject matters fit for specific rules. Thus, in one view, general rules could be established with regard to the definition of unilateral acts, the capacity of States to formulate them, persons authorized to formulate such acts and the causes of invalidity of unilateral acts. Other aspects, such as the legal effects, application, interpretation, duration, suspension, modification and withdrawal of unilateral acts, should be the subject of specific norms. In another view, there were certain common aspects relating, in particular, to the validity of international acts, the causes of invalidity and other topics which could be subject of common rules applicable to all unilateral acts.

245. Some other delegations expressed doubts about the distinction between general and specific rules. Thus, in one view, it was too early to consider making a distinction between general rules applicable to all unilateral acts and specific rules applicable to individual categories of such acts. Another view, expressing doubts on the necessity to divide the topic into general rules applicable to all unilateral acts and specific rules applicable to individual categories of unilateral acts, felt that the only aspect of unilateral acts that seemed to call for specific rules concerned whether and how they could be revoked.

246. Some other delegations differed even more from the approach suggested in point (b). Thus, in one view, the Commission should guard against an overly ambitious approach: there was no need for a comprehensive set of rules. A few general rules, together with a study of certain specific situations, could be sufficient. A study to that end could be

conducted within a reasonably short time and still make a useful contribution to the understanding of the role of unilateral acts in international law. In another view, unilateral acts did not lend themselves to general codification and a step-by-step approach dealing separately with each category of act might be more appropriate.

247. A number of delegations supported point (c), according to which the Special Rapporteur could initiate the study of specific categories of unilateral acts by concentrating first on those creating obligations for the author State (promises) without prejudice to recognizing the assistance of other categories of unilateral acts such as protest, waiver and recognition, which could be addressed at a later stage. In one view, while there was merit in the suggestion that the study of specific categories of unilateral acts should begin by concentrating on those acts which created obligations for the author State, it was questionable whether that category should be limited to promises. Another view suggested that although it would be best to concentrate first on unilateral acts which created obligations for the author State, recent events suggested that a focus on acts that corresponded to a State's position on a specific situation or fact would facilitate the collection of information on State practice.

248. Some delegations made a number of additional suggestions concerning the future work on the topic. Thus, in one view, the Commission should consider whether the difference between unilateral acts and non-conventional international agreements was based solely on the nature of the act or whether, in some cases, a series of concordant unilateral acts could constitute an agreement. According to this view, it was also important to consider the legal effects of unilateral acts, bearing in mind the distinction between unilateral acts addressed only to the author State and those addressed to other States. In another view, it would be useful to provide somewhere in the draft that unilateral acts, or some categories of them, should be registered pursuant to Article 102 of the Charter of the United Nations.

249. Some comments referred to the various draft articles submitted by the Special Rapporteur in his third report.

250. **Draft article 1** on the definition of unilateral acts was generally perceived as an improvement over the previous version of the draft article. It was said in this connection that the new draft article seemed to meet the concerns of some members of the Commission and of some Governments in the Sixth Committee and could therefore serve as a basis for the text as a whole.

251. Specific comments were made with regard to various elements of the definition.

252. One view supported the word "unequivocal" as a qualifier of the words "expression of will". In another view, this created difficulties as it seemed self-evident that any act producing legal effects must be clearly expressed to avoid disputes about interpretation. The key term in the definition of unilateral acts was rather "intention", and, if anything, it was the intention that must be unequivocal. A view was also expressed to the effect that the word "unequivocal" need not be construed as equivalent to "express". An implicit or tacit expression of will could be unequivocal.

253. Differing views were expressed as to the deletion of the word "autonomous", which in the previous version of the draft article also qualified the words "expression of will". It was noted in this connection that while it was encouraging to read that the Special Rapporteur had decided not to reintroduce the term "autonomous", it was apparent that there was still disagreement among members of the Commission as to the relevance of the concept of "autonomy" in the context of defining a "unilateral act", and compromise should be sought. In that regard, one view was that the notion of autonomy, understood either as independence vis-à-vis other pre-existing legal acts or as freedom of the State to formulate the act, should be included in the definition.

254. It was also pointed out that a unilateral act could not produce legal effects unless some form of authorization to do so existed under general international law. It was suggested in that regard that the definition should provide that a unilateral act was performed with the intention of producing legal effects under international law since the legal significance of the act and its binding force had to be decided according to international law, specifically, the principle of good faith.

255. In another view, it was essential to understand that, in order to be characterized as such, a unilateral act should generate autonomous legal effects. In other words, it should be independent of any manifestation of will on the part of another subject of international law. In this view, autonomy was an important criterion in

determining the strictly unilateral character of the act. However, if the study undertaken by the Commission covered only unilateral acts which were unrelated to pre-existing customary or conventional rules, the topic might lose much of its relevance. According to this view, although unilateral acts which clearly fell under treaty law should be excluded, unilateral acts which could enhance implementation of existing rules should be included.

256. As regards the words "formulated by a State", a view was expressed that, for the sake of clarity, it should be added that unilateral acts could be formulated orally or in writing.

257. Support was expressed for the element "with the intention of producing legal effects" contained in the definition. The element was considered critical by several delegations, who recalled in that connection the view of the International Court of Justice in the *Nuclear Tests* cases. The view was also expressed that the replacement of the phrase "acquiring legal obligations" by the words "producing legal effects" was a move in the right direction, as unilateral acts not only created legal obligations, but could also be a means of retaining rights and sometimes even of acquiring them. A suggestion was made that in order to avoid confusion in cases where the formulation of the unilateral act implied but did not refer explicitly to certain legal effects, after the words "producing legal effects" the phrase "or in a manner that necessarily implies the production of such effects" should be inserted between commas.

258. On the other hand, according to one view, it was doubtful whether the intention of the author State, although highly relevant, should be seen as the sole or fundamental criterion in the definition of a unilateral act; a unilateral act was binding not only to the extent that such was the intention of the author State but also inasmuch as it created legitimate expectations. In this view, the Commission should therefore consider how the principle of good faith should be reflected in the determination of the legal effects of unilateral acts. Although the issue would largely belong to the future Part Two, a reconsideration of draft article 1 might also be necessary. The same applied to some of the questions addressed in former article 6, which had been deleted, such as the effects of acquiescence in some situations and the question of estoppel.

259. With regard to the element of the definition consisting in the words "in relation to one or more other States or international organizations", a suggestion was made to the effect that the possible addressees of a unilateral act should be not only States or international organizations but all subjects of international law.

260. As regards the words "which is known to that State or international organization" contained in draft article 1, support was expressed for the elimination from the text of the requirement that the unilateral act must be formulated "publicly", which had been contained in a previous version of the draft article. The view was expressed, however, that it would be useful to consider, in the light of State practice, the manner in which the act could be made known to the addressee. In one view an earlier rendering which required that the act should not be simply known but notified or otherwise made known to the State concerned was preferable. Finally, one view preferred the words "formulated publicly" contained in the previous version of the draft article.

261. Support was expressed for **draft article 2**, stating that every State possesses capacity to formulate unilateral acts.

262. A suggestion was made to the effect that the article should be amended to reflect the fact that national parliaments were also authorized to formulate unilateral acts on behalf of the State.

263. Concerning **draft article 3**, general support was expressed for its **paragraph 1** stating that Heads of State or Government and Ministers for Foreign Affairs were considered as representatives of the State for the purpose of formulating unilateral acts on its behalf. It was pointed out in that connection that the paragraph was based on a felicitous analogy with the corresponding provision of the Vienna Convention on the Law of Treaties.

264. As regards **paragraph 2**, some delegations supported the concept that other persons could also be considered to be authorized to formulate unilateral acts on behalf of the State. Caution was advocated, however, lest the provision might leave the door open for any junior official to formulate a unilateral act that would more than likely be invalidated subsequently. The view was expressed that, as drafted, the provision might lead to multiple and conflicting declarations being made by officials at different levels of a single

State's Government. It was also said in this connection that the reference in the draft article to "the practice of the States concerned or from other circumstances" was problematic owing to the difficulty of proving the existence of such practice or circumstances. It was suggested in this regard that the paragraph should consider as persons having the capacity to commit the State those who, by virtue of their tasks and powers, could be deemed authorized to formulate unilateral acts that might be relied upon by third States. It was noted that the aspect of "reliance by third States upon the unilateral act" was missing from the paragraph. The underlying common view to these delegations was that the paragraph, as drafted, might be too broad and should be further circumscribed.

265. A suggestion was made to the effect that the binding force of declarations or notifications made on behalf of a State by persons other than Heads of State or Government and Ministers for Foreign Affairs should be established under the domestic legislation of the State concerned.

266. According to one view, draft article 3 should be amended to reflect the fact that national parliaments were also authorized to formulate unilateral acts on behalf of the State.

267. Under another view, the deletion of former article 4, paragraph 3, which laid down as a principle that "heads of diplomatic missions to the accrediting State and the representatives accredited by that State to an international conference or to an international organization or one of its organs" could also formulate unilateral acts on behalf of the State, was to be welcomed. This view stressed that such persons could not be deemed to be in a position to bind unilaterally the State which they represented at the international level, unless they had been specifically authorized for that purpose, and, to that end, State practice would have to be examined. According to this view, wording derived directly from article 7, paragraph 2, of the 1969 Vienna Convention on the Law of Treaties, as some had suggested, did not appear to offer the most appropriate solution in this case.

268. Support was expressed for **draft article 4**, according to which a unilateral act formulated by a person who is not authorized under draft article 3 to act on behalf of a State is without legal effect unless expressly confirmed by that State. It was pointed out in that connection that in view of the exceptional nature of the provision the requirement that subsequent confirmation must be given expressly was essential. It was suggested in that regard that the draft article should specify that such confirmation should be made in writing to ensure that it could be proved.

269. On the other hand, one view held that it was doubtful whether a unilateral act formulated by a person not authorized to do so could subsequently be approved by that person's State.

270. As regards **draft article 5** on invalidity of unilateral acts, it was observed that it constituted a good provisional basis for developing rules on the matter. It was said in that connection that rules on invalidity should be related to the rules defining the conditions of validity of unilateral acts, and that the Commission should perhaps first develop the latter before addressing the former. A suggestion was made to draw a distinction between relative and absolute (*ex lege*) invalidity.

271. According to one view, the invalidity of unilateral acts was one area where the application mutatis mutandis of the rules of the Vienna Convention on the Law of Treaties was acceptable. The Vienna rules on invalidity of treaties were based on the consensual character of the legal situation created by a treaty and consequently addressed defects in the expression of the true will of the parties (error, fraud, corruption, coercion, threat or use of force in violation of the Charter of the United Nations). Those causes of invalidity of treaties were applicable to unilateral acts as well and were appropriately included in draft article 5.

272. Other delegations, however, cautioned against a too close transposition of the Vienna rules on treaties to unilateral acts, in view of the different nature of the acts involved. They stressed that State practice should be the paramount guiding factor on the matter.

273. With specific reference to **paragraph 1** dealing with invalidity on the basis of an error of fact or of a situation which formed an essential basis of the State's consent to be bound by the act, a suggestion was made that the word "consent" contained therein was inappropriate in the context of unilateral acts.

274. Support was expressed for **paragraph 6** dealing with invalidity in the case of a unilateral act conflicting with a peremptory norm of international law. It was remarked in this regard that a statement or a unilateral

act in general could not have the purpose of producing effects incompatible with a norm of *jus cogens*.

275. One view felt that the paragraph might give the impression that a unilateral act could deviate from a dispositive rule of international law. Under this view, such an act could be lawful only if it was an act preliminary to the conclusion of a treaty; consequently, draft article 5 should perhaps make clear that such a unilateral act could not have legal force until it was accepted by another State.

276. According to another view, a conflict between a unilateral act and a treaty obligation, especially of a contractual nature, need not necessarily lead to invalidity of the unilateral act. Under this view, it was for the international community to decide whether a treaty obligation must always prevail, or whether one could presume that the legal effects of a unilateral act were not incompatible with treaty obligations, and that the act would be interpreted accordingly.

277. Support was expressed for **paragraph 7** on the invalidity of a unilateral act conflicting, at the time of its formulation, with a decision of the Security Council. It was said in this connection that the paragraph was consistent with Article 25 of the Charter of the United Nations, under which Members of the United Nations agreed in advance to carry out the decisions of the Security Council. A suggestion was made that the paragraph should be expanded to make the rule contained in Article 103 of the Charter of the United Nations applicable to unilateral acts, so that obligations under the Charter would prevail over any other obligations, whether assumed by treaty or by unilateral act.

278. As regards **paragraph 8** on the invalidity of a unilateral act formulated in conflict with a norm of fundamental importance to the domestic law of the State formulating it, the suggestion was made that it should include requirements similar to those contained in the corresponding provision of the 1969 Vienna Convention on the Law of Treaties since otherwise it might afford States too broad an opportunity to avoid international obligations. According to this view, paragraph 8 would be acceptable if it provided that the violation to which it referred must be manifest.

279. Some delegations found paragraph 8 difficult to accept. According to one view, States would not normally formulate unilateral acts conflicting with a norm of fundamental importance to their domestic law, in particular, their constitution. If such were to be the case, the matter should be resolved at the domestic level. Consequently, under this view, the paragraph should be removed or deleted. Another view uncomfortable with the paragraph stressed that if international law was superior to domestic law, an international act could not be appraised by reference to the norms and principles of a State's domestic law.

280. Some delegations suggested new causes of invalidity to be added to draft article 5.

281. Thus, under one view, a unilateral act should be invalid or at any rate ineffective against States that were co-parties to a treaty with the State formulating the act, if the act was incompatible with the treaty and the States parties did not accept the act.

282. According to another view, one important aspect of the validity of unilateral acts had to do with whether a State could dispose of rights and obligations if in so doing it affected the rights or obligations of third States without their consent. Even if there were no defects in the expression of a State's true will, its intention to produce legal effects might fail because that State did not have the right to act unilaterally in a given situation. Such a situation might arise, for example, following the dissolution of a State into several new States. Pending the definitive settlement of succession issues, the right to dispose, for instance, of the property and archives of the predecessor State would depend on the mutual agreement of all successor States, and any unilateral act aimed at acquiring or renouncing any right or obligation relating to the succession or claiming continuity from the predecessor State should be regarded as invalid. According to this view, a provision should therefore be included in the draft articles regarding the incapacity of a State to formulate a unilateral act negatively affecting the rights of third States without their consent.

D. Reservations to treaties

1. General comments

283. Several delegations felt that the Vienna Conventions, although laying the foundations for the law governing reservations, left many questions unanswered. This meant that efforts should focus on filling gaps in the existing regime by means of a guide to practice, rather than modifying the Vienna

Conventions. The definition of concepts was also very important since several problems issued from a lack of clarification and would determine the field of application of the reservations regime. From this point of view, the draft guidelines with commentaries would be of considerable assistance to States. The guidelines successfully combined the regime of the Vienna Conventions of 1969 and 1986 with a survey of practice in applying the relevant provisions of those conventions. Useful examples were those dealing with the distinction between reservations and interpretative declarations or with procedures that could be followed to achieve the same results as reservations. Many delegations consequently welcomed the new draft guidelines on alternatives to reservations, which would be of practical assistance to States. These procedures could protect the integrity of the object and purpose of a treaty while allowing a maximum number of States to become parties thereto. It was thus hoped that the guidelines would cause States to attach greater importance to alternatives to reservations.

284. According to another view, alternatives to reservations or interpretative declarations should be regarded as outside the topic and it would not be useful to expand it to include clauses or guidelines on issues related to alternatives to reservations.

285. The inclusion of international organizations as authorized to make reservations was also welcomed, as reflecting developments in international relations and the increasingly important role of international organizations' lawmaking. However, one delegation questioned whether the Guide should refer to international organizations since the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations had not yet entered into force. Another delegation observed that the expression "lignes directrices" in French would be more adequate (for "guidelines") than "directives".

286. According to another point of view, the Commission should clarify whether the purpose of the Guide to Practice was to assemble and codify existing practice regarding reservations to treaties providing guiding principles for the interpretation of the Vienna Conventions of 1969 and 1986 or to supplement the Vienna Conventions by adding norms and principles not specifically provided for therein.

287. It was also stated that draft guidelines helped to clear up doubts about the nature of certain unilateral statements concerning treaties which previously had been scarcely defined.

288. Other delegations expressed doubts about the practical nature of the Guide to Practice judging from the guidelines so far adopted, which seemed to be overly elaborate or even redundant, and urged the Commission to find practical solutions to real-life problems. Examples referred to guidelines on conditional interpretative declarations or interpretative declarations. The Special Rapporteur's intention to deal with the "core issues" — admissibility of reservations and legal effect of objections and of inadmissible reservations and conditional interpretative declarations — was welcome and eagerly awaited by several delegations. Procedural matters such as the consequences of an incorrect procedure for formulating reservations or the question of whether reservations could be made vis-à-vis only some of the States parties to a convention or for a limited period of time should also be considered. Even rules that at face value were merely procedural could have major consequences at the level of substantive law. The role of the depositary as a possible guardian of a treaty, particularly with regard to unacceptable reservations, should also be considered, since the position taken by the depositary very often influenced the perception of States as to the acceptability or legality of reservations.

289. A number of delegations referred once again to the question of the competence of human rights monitoring bodies to pronounce on the compatibility of reservations with the object and purpose of the treaty. Some welcomed the Special Rapporteur's suggestion that the Commission should consider the matter later and try to find a solution based on general rules reconciling the divergent views and demands of States, thus avoiding the increasing fragmentation of international law. The regime of reservations to treaties should not be refashioned sector by sector, and only the parties to the negotiation of a treaty could specify the reservation regime that would apply to it.

290. One delegation welcomed the newly inaugurated practice of the Treaty Section of the United Nations of distributing depositary notifications electronically but also advocated the inclusion in the agenda of the Sixth Committee a topic entitled "Practice of the Secretary-General as depositary of multilateral treaties", which

would foster a better understanding of the complexities of the issues.

2. Draft guidelines

Draft guidelines 1.1 (Definition of reservations), 1.1.1 (Object of reservations)

291. It was pointed out that there was a certain discrepancy between draft guideline 1.1 on the one hand and draft guidelines 1.1.1, 1.1.3 and 1.3.3 on the other, to the extent that the treaty as a whole is not mentioned in the first guideline. The problem of reservations involving the entire treaty should also be addressed.

Draft guideline 1.1.2 (Instances in which reservations may be formulated)

292. It was stated that notification of succession should also be included in this guideline.

Draft guideline 1.1.8 (Reservations made under exclusionary clauses)

293. While the guideline was supported, the observation was made that the commentary relied too much on the practice of the International Labour Organization. Moreover, a doubt was expressed and a clarification was requested on whether article 124 of the Rome Statute allowing a State to declare that it did not accept the jurisdiction of the Court for a period of seven years with respect to certain crimes amounted to a reservations clause taking into account article 120 prohibiting all reservations.

Draft guideline 1.2.1 (Conditional interpretative declarations)

294. The view was expressed that the draft guideline should be more precisely worded since there would seem to be no criterion for distinguishing between an interpretative declaration and a conditional interpretative declaration. A greater clarification on the procedure by which authors of conditional interpretative declarations intended to make their consent to be bound subject to a specific interpretation of the treaty was also needed. Mention was made of the examples of declarations with regard to the European Framework Convention for the Protection of National Minorities containing definitions of the term "national minority". Doubts were expressed as to whether conditional interpretative declarations should fall outside the definition of reservations, thereby preventing the mechanism of objections from playing a role and resulting in the imposition of such conditional interpretative declarations upon other States. It was not to be implied that conditional interpretative declarations were a distinct legal category.

Draft guideline 1.3.1 (Method of implementation of the distinction between reservations and interpretative declarations)

295. A view was expressed that the distinction between reservations and interpretative declarations should rather focus on the effects of the two types of statements.

Draft guideline 1.3.3 (Formulation of a unilateral statement when a reservation is prohibited)

296. A view was expressed that the guideline should also stipulate that conditional interpretative declarations in a treaty are invalid when a treaty prohibits reservations. In such a case, an arbitral tribunal or a court could eventually determine the exact nature of a unilateral statement. It was also pointed out that a guideline indicating under which circumstances an interpretative declaration should be understood to be a reservation to which the guidelines would apply would be sufficient.

Draft guideline 1.4.1 (Statements purporting to undertake unilateral commitments)

297. It was pointed out that this draft guideline raised general questions regarding admissibility to the extent that the restrictions contained in unilateral statements made under optional clauses would be admissible only when they were not inconsistent with the purpose of the provision in question.

Draft guideline 1.4.7 (Unilateral statements providing for a choice between the provisions of a treaty)

298. The view was expressed that reference should be made (by adding the words "or permits them to make such a choice") to cases in which a State had simply the option of making a choice between two or more provisions of a treaty, as in the 1982 United Nations Convention on the Law of the Sea, which allowed

States to choose among different modalities of dispute settlement.

Draft guideline 1.5.1 ("Reservations" to bilateral treaties)

299. It was stated that the word "reservations" on the title did not make much sense since it was clear that such statements did not constitute reservations.

1.7 Alternatives to reservations and interpretative declarations

300. Several delegations thought that these guidelines on alternatives to reservations and interpretative declarations would be especially useful. One delegation was of the opinion that the commentary should contain a reference to the practices of "opting in" and "opting out" common in European Community law (as, for example, in the Protocol on Social Policy). Moreover, the distinction between procedures forming part of the treaty itself and those outside it was correct.

Draft guideline 1.7.2 (Alternatives to interpretative declarations)

301. The observation was made that the conclusion of a supplementary agreement purporting to interpret the original treaty was one of the means envisaged in article 31, paragraph 3 (a), of the 1969 and 1986 Conventions on the Law of Treaties. It was also pointed out that limitations on the power to modify the provisions of a treaty should be referred to specifically in the guidelines to ensure that their terms were consistent with the 1969 Vienna Convention on the Law of Treaties.

Draft guidelines 2.2.1 (Reservations formulated when signing and formal confirmation), 2.2.2 (Reservations formulated when negotiating, adopting or authenticating the text of the treaty and formal confirmation)

302. While their content was supported, the view was expressed that these guidelines could be easily combined.

Draft guideline 2.2.4 (Reservations formulated when signing for which the treaty makes express provision)

303. It was pointed out that this draft guideline raised the general question whether all the guidelines were subject to a *lex specialis* rule. Other delegations expressed their support for the draft guideline.

Draft guidelines 2.4.4 (Conditional interpretative declarations formulated when negotiating, adopting or authenticating or signing the text of the treaty and formal confirmation), 2.4.5 (Non-confirmation of interpretative declarations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]), 2.4.6 (Interpretative declarations formulated when signing for which the treaty makes express provision)

304. Taking into consideration the doubts expressed about the reason for creating a separate legal category of conditional interpretative declarations, these guidelines were not acceptable to one delegation.

3. Late reservations (Draft guideline 2.3.1)

305. With regard to the question of late reservations, some delegations felt that the Special Rapporteur's proposals, while acknowledging that the principle was not absolute, respected the traditional view that a reservation could not be made after a State had expressed its consent to be bound and that it constituted a blend of good sense and flexibility.

306. Other delegations thought that reservations should be very strictly regulated in cases in which they were not authorized by the treaty itself. While the general rule should continue to be that reservations could only be made at the time of the expression of consent to be bound by the treaty, this rule could be changed by the will of the parties to a treaty. The principle of *pacta sunt servanda* could be undermined and the stability of the international legal order endangered if objections to late reservations had the same limited effect as objections to timely reservations. In such cases, the admissibility of late reservations, given their exceptional nature, should be subject to certain conditions, such as unanimous (even tacit) acceptance by the parties, which would be a sufficient guarantee to prevent possible abuses, especially if it was accompanied by a provision stressing the need for adequate information.

307. According to another view, the unanimous consent of the other parties to the treaty should be obtained before the formulation of a late reservation

amounting to an amendment to the treaty or to a proposal to amend the treaty in the sense of part IV of the Vienna Convention on the Law of Treaties.

308. Several delegations welcomed the decision of the Secretary-General to extend the 90-day period for objections to late reservations to 12 months, thus enabling Governments to analyse and assess late reservation. It was pointed out, however, that the deadline for objections to late reservations should be reckoned from the date of receipt of the corresponding notification.

309. The problem of modification to reservations was also mentioned. Such modifications did not always constitute a diluted form of withdrawal or partial withdrawal (in which cases the procedure for late reservations should not be followed), but could also constitute a new late reservation for which the tacit unanimous consent of all contracting parties (or the total absence of objections) would be required for acceptance. On the contrary, in cases of modifications of the first kind, objections should affect only the State formulating the modification and the State objecting to it. According to another view, it was doubtful whether the open-ended exception provided in draft guideline 2.3.1 could be justified. In the absence of any further limitations, it was feared that this would open the door to the admissibility of late reservations. The practice of the Secretary-General of circulating late reservations and not making a distinction between late reservations having the character of a partial withdrawal and completely new reservations was also criticized. It was indicated that the views on the matter expressed by the Legal Division of the Council of Europe were more appropriate to the system of the law of treaties.

310. The view was expressed that the issue of late reservations was extremely delicate, as it pertained rather to the progressive development of international law, taking into account the exceptional nature that such reservations ought to have. Draft guideline 2.3.1 aimed to reflect both article 19 of the Vienna Convention on the Law of Treaties and the fact that States parties to an international treaty resorted to late reservations in order to adjust their obligations.

311. As to the proposal of the Special Rapporteur regarding the effects of an objection to a late reservation, namely that the reserving State remained bound by the treaty in its entirety, the feasibility of such an approach was doubtful, especially if it was extended to all inadmissible reservations.

312. It was pointed out that the whole issue should be examined in depth by the Commission, bearing in mind its possible consequences for current positive law and State practice.

E. International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)

1. General comments

313. It was generally agreed that the topic was of particular importance in the field of international environmental law and that the draft articles should take the form of a composite convention, with two objectives: to encourage States to agree, bilaterally and multilaterally, on detailed regimes applicable to the conduct of particular activities; and, in the absence of such a regime, to provide States with a basis for avoiding or settling disputes about the risk or the occurrence of significant transboundary harm caused by their activities.

(a) Comments on prevention

314. As regards the title, the view was expressed that it needed to be shortened but still had to convey a proper idea of the subject matter, as well as capturing the type of harm or risk involved. However, preference was also expressed for retaining the current title of the draft articles until a final text had been prepared which analysed both aspects of the topic, namely, prevention and international liability.

315. Support was expressed for the changes to the draft articles proposed by the Special Rapporteur, which nonetheless had avoided any substantial revision of the draft articles as adopted on first reading. Several delegations considered that the draft articles provided for a reasonable balance of both the economic interests of States of origin and the interests of States likely to be affected. It was felt, however, that prevention should be the key principle of the draft articles and that clear references to international law needed to be made.

316. A view was expressed that, regrettably, not all of the comments submitted by Governments had been fully taken into account by the Special Rapporteur and by the Commission.

317. It was said that in some cases the obligations contained in the draft articles appeared to be unclear because of the difficulty of defining such terms as significant transboundary harm, due diligence and equitable balance of interests.

318. The point was made that the text still needed to expressly reflect the well-recognized principles that precautionary action should be taken, that the polluter should pay and that development should be sustainable, thus underlying the process of equitable balancing of interests referred to in draft articles 10 and 11. In that connection, it was stated that the essence of the precautionary principle — that in certain circumstances protective measures should be taken even in the absence of complete scientific proof of a causal connection between an activity and the harm that was occurring or was anticipated — was lacking in the draft articles on prevention and prior authorization. Furthermore, the view was expressed that the precautionary principle should be mentioned explicitly in a future convention that purported to deal with the prevention of transboundary harm from hazardous activities. In addition, it was pointed out that consideration should also be given to the concepts of best available technology and best environmental practices.

319. It was stated that, while concurring that the general obligations of cooperation and consultation did not entail a right of veto on planned activities by the potentially affected State, the provisions proposed by the Commission in draft articles 9, 10 and 12, although realistic and well balanced, could nonetheless be further refined. Failure by the State of origin to abide by the obligations in question would, however, amount to a breach of the due diligence obligation of prevention.

320. The view was expressed that if a State of origin could not prevent altogether a particular kind of significant transboundary harm, its duty was to minimize both the probability and the magnitude of such harm.

321. It was stated that, although the draft articles were intended to apply worldwide and regional conventions might not be entirely suitable for the purpose, more use could have been made of conventions developed in the Economic Commission for Europe, such as the 1991 Convention on Environmental Impact Assessment in a Transboundary Context. Furthermore, the provision for public participation could usefully have been drawn from the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

322. The point was made that the topic needed to be considered in the context of development issues; funding and transfer of resources to less-developed countries, including enhanced access to suitable technology at a fair price, was essential to the success of standard-building and implementation efforts. While welcoming the inclusion of a preamble mentioning the right to development, preference was voiced for having one or more articles on the linkage between capacity-building and effective implementation of the duty of due diligence included in the draft.

323. It was stated that the mention in draft article 11 of the factors involved in an equitable balance of interests would not dilute the obligation of prevention established in draft article 3. That issue had already been raised in draft article 10, paragraph 2; moreover, States' efforts to ensure that the measures undertaken by the State of origin were mutually satisfactory and proportional to the requirement of safe management of the risk involved were dealt with in draft articles 9, 10, 11 and 12.

324. Different views were expressed concerning the scope of the draft articles. On the one hand, the point was made that there was a need to clarify and strengthen the respective provisions. Suggestions were made for placing some limits on the scope of the topic, for example, by providing that it concerned only transboundary harm caused by an activity "through its physical consequences". That term meant those consequences that either directly or indirectly caused harm, although it was also noted that, in some cases, the mere risk of harm brought about physical consequences. The view was also expressed that the scope of the draft articles should include significant transboundary harm caused in areas outside national jurisdiction, so as to reflect the authoritative assessment by the International Court of Justice that the general principle of prevention of environmental harm applied specifically to regions over which no State had sovereignty. In that connection, it was stated that concerns over the protection of the ecosystems

pertaining to the relevant environments should be reflected in either draft article 1 or draft article 2. Finally, the point was made that creeping pollution also should fall within the scope of the draft articles, since one of the main features of a sound environmental impact assessment was the period of time involved, in combination with other sources. According to this view, significant transboundary harm resulting over a period of time should thus be subject to the obligation of prevention; the reasonableness of that obligation, however, would depend on its being an obligation of conduct and not of result.

(b) Comments on liability

325. With respect to liability, some delegations supported the deferral of the consideration of the question until the draft articles on prevention had been adopted on second reading. However, some other delegations emphasized that the two aspects were inextricably linked and that the task of the Commission would not be complete without a treatment of liability proper. In that connection, the suggestion was made to include a general article at the beginning explaining the purpose of the draft articles as a whole. Still other delegations were of the view that the Commission should give priority to defining the rules on liability and even commence work on it at the next session.

326. In support of addressing the question of liability, it was stated that there was an urgent need to develop rules governing international liability for transboundary harm. The rules should also impose a duty on States to prevent serious transnational environmental harm, as already laid down in principle 2 of the Rio Declaration and principle 21 of the Stockholm Declaration. The International Court of Justice, in its advisory opinion on the *Legality of the threat or use of nuclear weapons*, had confirmed that duty as a rule of customary international law.

327. The suggestion was made that, in developing rules on international liability, the Commission should take account of international instruments concluded in the field of civil liability for nuclear accidents. Those instruments incorporated the principle of strict liability and provided for an effective regime of compensation for all loss, including environmental damage.

328. The view was expressed that the State liability regime would involve a set of primary obligations, mostly of a due diligence nature, arising out of the occurrence of harm, despite the fact that due diligence had been observed or when the lack of it could not be established. It was also stated that the draft articles should require the minimization and repair of actual transboundary harm, whether or not it resulted from a foreseeable risk.

329. It was stated that an objective liability regime, one disengaged from the notion of illegality, should not go so far as to attribute to the State of origin a primary obligation to repair. The obligation should be viewed as subsidiary, applicable to the extent that the author of the harm had a responsibility in the first place to repair it in accordance with the polluter-pays principle. In other words, the liability of the State of origin would only be engaged when the author of the harm did not fulfil an obligation to repair.

330. Having indicated that the duty of prevention was one of conduct, not result, the point was made that a breach of that duty was therefore a matter of State responsibility, regardless of whether harm had occurred. If it had, the rules governing liability came into play, as well as State responsibility. It was, however, difficult to settle the question of liability for transboundary harm without reference to specific forms of hazardous activity that could give rise to such harm. The adoption of residual rules would not solve the problem of compensation.

331. The view was also expressed that international liability could relate to many fields in international law, such as the marine environment, oil pollution, nuclear damage, natural resources, transportation, military activities and space, and that for some of those areas, a specific regime of liability had already been established. Since each of the various categories required consideration of its special characteristics, it would be difficult to establish a general principle applicable to all fields. Consequently, according to this view, the Commission's focus should be on prevention.

2. Comments on specific articles

Preamble

332. Support was expressed for the inclusion of the second preambular paragraph, referring to permanent sovereignty over natural resources. That was a basic principle which should be incorporated in any international instrument governing the use of those resources.

333. It was stated that the fifth preambular paragraph was ambiguous, since it might imply a limitation on the jurisdiction of States over their own territory, an unacceptable proposition. In that connection, it was suggested that the difficulty should be overcome by referring instead to the principle of responsible and sustainable use and management of natural resources. Draft article 5, on implementation, envisaged the establishment of monitoring mechanisms. A monitoring body set up by the State of origin could fulfil that function, as long as it operated efficiently.

334. As regards the suggestion that the fifth preambular paragraph should be placed in the main body of the convention as an independent article, a view was expressed that, for the purposes of interpretation, a preambular clause had the same legal effect as the operative paragraphs of a treaty.

Article 1
Activities to which the present draft articles apply

335. It was stated that since the draft articles were designed to expound the principles of risk management, draft article 1 had to be retained for it made clear that the draft articles applied to activities not prohibited by international law.

336. The view was expressed that although it would be unwise to attempt to define all the activities covered by the convention in draft article 1, a minimum list could nonetheless be included. Draft article 1 could also possibly provide for States to designate additional activities to be covered, either on a unilateral basis or by agreement with other States.

337. Some delegations concurred with the Special Rapporteur's suggestion to delete the expression "not prohibited by international law" from draft article 1 on the basis that the draft articles should apply to any activity involving risk, irrespective of whether it was contrary to any other rule of international law. Any illegal activity would trigger the rules of State responsibility. In that connection, it was considered that article 18 of the draft would apply if the activity contravened other legal obligations.

338. However, other delegations favoured the retention of the expression "not prohibited by international law" in consideration of the wide range of implications involved. Another reason for retaining the phrase was the need to keep the link between the rules regulating the duty of prevention and those governing international liability as a whole. It was stated that a suitable explanation of the phrase could be added if necessary. On the other hand, its deletion might even require a revision of the entire draft articles.

339. It was suggested that articles 1 and 2 should contain an explicit reference to both public and private sector activities, even though only States would be accountable for their compliance with the draft articles.

340. A suggestion was made to replace the word "activities" with "any activity", on the assumption that the draft articles were not intended to apply to groups of activities each of which would have a minimal transboundary impact but which, when taken together, would cause transboundary harm.

Article 2
Use of terms

341. According to one view, the new wording in the definition of "risk of causing significant transboundary harm" was preferable since it made clear that a range of activities was covered by the definition. However, a different view held that the definition was somewhat confusing and that it would be preferable to replace the word "disastrous" with "significant".

342. The view was expressed that it was necessary to clarify whether the two types of harm referred to in subparagraph (a), "significant" and "disastrous", were truly two different types of harm or two different levels of the same type of harm. It was also stated that there was a need to clarify and strengthen the definition of significant harm. It was furthermore stated that the term "significant harm" was the most appropriate and should be retained.

Article 3
Prevention

343. Support was expressed for the retention of the phrase "appropriate measures" rather than the phrase "due diligence", which was deemed to be notoriously unclear. It was also stated that, although the regime of prevention incorporated the duty of due diligence, there was no need to include a specific mention of that duty in draft article 3.

344. The point was also made that draft article 3 codified the customary no-harm rule as a due diligence obligation. In other words, the mere occurrence of

harm would not entail responsibility; "negligent harm" would be required for there to be wrongfulness. According to this view, to argue that non-fulfilment of the due diligence obligation of prevention did not imply that unlawfulness was tantamount to nullifying the whole endeavour, particularly in view of the efforts to calibrate the obligation of prevention in due diligence terms.

345. A suggestion was made that the idea contained in paragraph (12) of the commentary to draft article 3, namely, that States should be required to keep abreast of technological changes and scientific developments, should be incorporated in the draft article.

Article 4
Cooperation

346. It was stated that there was a need for a differentiated application of the due diligence obligation proportional to the economic and technological development of the States concerned and that, accordingly, in order to enhance and harmonize the prevention capacity of individual States, the provisions on cooperation and implementation in draft articles 4 and 5 should be further articulated and provide for more stringent rules.

Article 5
Implementation

347. As regards the monitoring mechanism in draft article 5, the point was made that it should be developed on a multilateral basis.

Article 6
Authorization

348. Support was expressed for the modifications incorporated, which clarified the obligations of the State of origin concerning prior authorization.

Article 7
Environmental impact assessment

349. Support was expressed for the changes made to the draft article.

350. The point was made that the insertion of the words "in particular" highlighted the assessment of the possible transboundary harm which might be caused by an activity. The emphasis placed on that aspect was queried, as compared with other legitimate concerns of the State of origin, such as the importance of the activity in question for the development of the whole region, including neighbouring countries. Consequently, it was suggested that possible transboundary harm should instead feature as one of the determining factors among others, the words "in particular" being replaced by "inter alia".

351. The view was expressed that the article on environmental impact assessment required further elaboration. In that connection, it was stated that confining the requirements of such an assessment to activities subject to the authorization regime seemed to be of limited use. Since under draft article 6 such activities fell within the scope of the draft articles, it would be almost impossible to assess whether a given activity involved a risk of causing significant transboundary harm. The Commission should also consider providing guidance to national legislators on criteria for making an environmental impact assessment, drawing on existing conventional practice, especially as developed at the multilateral level in the framework of the United Nations Economic Commission for Europe process. It was indicated that such assessment was one of the factors for the determination of "all appropriate measures" making up the due diligence standard of prevention, but that the Commission should consider mentioning other elements of international practice, such as the best available technology, the best environmental practices, the polluter-pays principle (in preventive terms) and the precautionary principle.

352. A suggestion was also made that a set of time frames should be added to draft article 7 to ensure the speedy implementation of a monitoring policy to prevent the risk of transboundary harm.

353. Support was expressed for the expansion of the draft article, since it was doubtful whether it would be feasible to assess the possible transboundary harm caused by an activity without carrying out a full environmental impact assessment relating to the entire environmental impact of a proposed activity.

354. It was also suggested that the word "prior" should be inserted before the word "authorization". Furthermore, it was stated that the insertion of the word "impact" before the word "assessment" would clarify the nature of the environmental assessment referred to.

Article 9
Notification and information

355. Support was expressed for the more stringent procedural rules introduced to draft article 9 on the requirements for notification and information.

356. As regards paragraph 2, the view was expressed that the provision implied that an environmental impact assessment must be carried out before the State of origin authorized the activity in question, and that information must be given to the public before it was authorized. A preference was also expressed for the deletion of the paragraph, since the provision was deemed to give the potentially affected State a right to obstruct the planned activities.

Article 10
Consultations on preventive measures

357. Support was expressed for the more stringent procedural rules introduced in draft article 10 on consultations. In that connection it was stated that the obligation placed on the State of origin to introduce appropriate interim measures for a reasonable time created the necessary link between the lifespan of such measures and the period of time needed to resolve the dispute at hand.

358. It was suggested that the question of whether the activity in question could be authorized prior to the conclusion of consultations should be clarified, as paragraph 2 bis implied that it could be, while paragraph 3 implied the opposite.

359. A preference for the deletion of paragraph 2 bis was voiced on the basis that it gave the potentially affected State a right to obstruct the planned activities.

Article 14
National security and industrial secrets

360. A suggestion was made to replace the phrase "as much information as can be provided under the circumstances" with the words "all data and information to the extent that circumstances permit".

Article 15
Non-discrimination

361. The view was expressed that particular importance should be given to draft article 15, which set forth the principle of non-discrimination with respect to redress on the basis of nationality, residence or place where the injury might occur. It was noted that acceptance of that principle by the international community would in itself constitute remarkable progress.

362. It was proposed that the words "or have suffered such harm" should be inserted after the words "significant transboundary harm".

Article 16
Emergency preparedness

363. The inclusion of draft articles 16 and 17 was welcomed as they were deemed to be indispensable in ensuring a timely and adequate response to harm caused by hazardous activities.

364. As regards emergency preparedness, it was stated that consideration could be given to incorporating into the draft article paragraphs based on article 28, paragraphs 2, 3 and 4, of the Convention on the Law of the Non-navigational Uses of International Watercourses.

Article 19
Settlement of disputes

365. Different views were expressed on the issue of the dispute-settlement provision. On the one hand, a preference was voiced for avoiding any compulsory rules on the matter since the matter should be left to the States concerned. There was also support for the approach envisaged in draft article 19 concerning the interpretation or application of the draft articles, according to which the choice of method would be based on the mutual agreement of the parties and would, in the absence of such agreement, permit the establishment of an independent commission whose findings would be of a recommendatory nature.

366. On the other hand, the point was made that the treatment of dispute settlement remained meagre and that existing multilateral environmental agreements provided a sound basis for the development of a stronger, more effective dispute settlement procedure, and especially for drafting provisions on fact-finding and conciliation.

367. Additional clarification on the composition and nature of the fact-finding commission mentioned in draft article 19, paragraph 2, was deemed necessary.

368. It was suggested that the fact-finding commission referred to in paragraph 2 should also have conciliation

powers, since there could be disputes other than those relating to the facts. Provisions concerning the composition of the commission should also be added to the draft article, based on article 33, paragraphs 5 to 9, of the Convention on the Law of the Non-navigational Uses of International Watercourses.

3. Final form of the draft articles

369. Support was expressed for the adoption of the draft articles as a framework convention, which would therefore require a modest adaptation of the text. The resulting instrument should stimulate the conclusion of more specific bilateral or regional agreements and national commitments as well as accommodate existing ones, and would not prejudice higher standards laid down in other related bilateral or regional treaties.

370. The point was made that consideration could be given to the adoption of a separate instrument on prevention, on the understanding that it would form the basis for the continuation of the Commission's work on the liability aspect. Another view supported the adoption of a convention that would deal with both the prevention and the liability aspects of the topic.

371. It was also noted that if the text were to be adopted as a treaty, some States might be discouraged from signing it owing to difficulties in their domestic ratification process. According to this view, it would therefore be preferable to adopt the draft articles as a guideline or resolution establishing a standard set of procedural requirements. Another reason for such an approach was the ambiguity as to what was envisaged by a framework convention.

372. A view was also expressed that since the obligations of conduct that were the object of the draft articles must be translated into actions designed to prevent harmful activities affecting neighbouring States, it would be more appropriate to draft guidelines that could form the basis for more detailed regional arrangements between the parties concerned.

F. Other decisions and conclusions of the Commission

373. With regard to its long-term programme of work, many delegations expressed appreciation for the Commission's consideration of the question. They saw particular merit in the proposed new topics in view of the potential need for clarification of the law in areas in which practical problems could arise. It was also emphasized that the Commission should concentrate initially on the topics currently under consideration. In that context the Commission was also cautioned against the adoption of an overly ambitious agenda which might prevent it from concluding the various topics on its agenda in a timely fashion. Support was expressed in general for the priority among the topics recommended by the Commission.

374. A question was raised as to whether the criteria adopted by the Commission in establishing its long-term programme of work were consistent with its decision that topics should reflect the needs of States but should also reflect new developments in international law, when the most significant of those new developments were those having to do with non-State actors. The Commission seemed to have chosen to stay with well-worn subjects: of the five topics suggested, three were left over from the examination of other questions: responsibility of international organizations was related to State responsibility, the effects of armed conflict on treaties was related to the law of treaties, and shared natural resources of States was related to the law of the non-navigational uses of international watercourses. Of the three, the topic of responsibility of international organizations seemed to be of the most practical interest, considering their increasingly autonomous role and the growing amount of jurisprudence from national tribunals. On the other hand, the topic of the effect of armed conflict on treaties seemed outdated in an era when "formal" war had virtually disappeared and had been replaced by other forms of conflict, which varied from case to case and resisted international codification. Lastly, the topic of shared natural resources, the only one remaining of the four topics suggested in the area of the environment, seemed too restricted in scope if, as suggested in the feasibility study, it was limited to water and confined groundwater sources. Since it was inadvisable to broaden the topic to cover the law of the human environment as a whole, the Commission might consider the precautionary principle, which was of greater general interest, especially as it had already been applied in several conventions and many national laws, but required clearer definition.

375. According to the above view, if the Commission truly intended to take a forward-looking approach, it

should have chosen a topic having to do with human rights, economics or development. It was suggested that perhaps the Commission had wished to avoid duplicating the work of other lawmaking bodies, or perhaps certain fields, economic development, for instance, did not lend themselves to international codification. Although much of development law derived from multilateral and bilateral treaties of assistance and cooperation, and unified codification was not advisable, it would be interesting to identify and develop new principles, for example non-reciprocity or best practices, which were found in such treaties.

376. As to the new themes proposed, it was stated that the Commission should have a clear set of priorities. It was indicated that the Commission had been right to give priority to the topic "Responsibility of international organizations", given the globalization of international relations. Much depended on the international organizations themselves, which were growing in number, while their mandates were growing ever more extensive. Yet their legal status was far less clearly defined than that of States. It might therefore be worth also considering the associated topic of the legal status and capacity of international organizations. The starting principle with regard to this topic should be that, in addition to the general rules in force in the field of State responsibility, the international law of responsibility as it applied to international organizations should include other special rules required by the particular features of the subject. To be sure, the scarcity of international practice on the matter would make the work of the Commission more difficult. However, the syllabus was thorough and well thought out. Of particular interest were the ideas put forward on combinations of responsibilities, a sensitive topic owing to the special nature of international organizations and countermeasures.

377. The view was also expressed that the question of the effect of armed conflict on treaties was an ideal topic for codification and the progressive development of international law, since recent State practice was abundant, but many interpretative uncertainties remained. The appearance of new types of international conflict and military occupation required special legal consideration. The schema relating to the topic was very interesting, although point 2, "The definition of a treaty for present purposes", raised some questions. Surely there was no need to arrive at a definition of a treaty other than that contained in the 1969 Vienna Convention. The elaboration of new instruments of codification and development should not result in a multiplication of concepts and create legal uncertainties.

378. With regard to the proposed topic "Expulsion of aliens", it was remarked that it was directly related to the major concerns of the twentieth century and had already been included in the Commission's first work programme in 1948 under the topic of the right of asylum. The right of States to expel aliens had never been in doubt, and thus consideration of the item would necessarily focus on cases of mass expulsion, which was already prohibited by the major human rights instruments. Furthermore, collective expulsion usually occurred in connection with major national crises, and thus should probably be dealt with through programmes of assistance geared to the particular aspects of the situation, rather than through regulation by general rules. It was also stated with regard to this topic that since the matter was part of the domain reserved for the State with only a few restrictions in general international law in the area of human rights protection, notably with regard to refugees and their right to asylum, the subject did not seem a suitable one for codification as international law.

379. Some delegations considered the topic "Risks ensuing from fragmentation of international law" to be extremely important: a large number of international bodies were involved in codifying various branches of international law, yet had practically no contact with each other or with the Commission. A real danger of fragmentation therefore existed, as Governments and scholars had frequently pointed out. It was not clear, however, what form the Commission's work on the topic would take. It was also stated that the actual and potential conflicts stemming from the diversity of legal regimes and structures governing a particular situation lent themselves more to description and analysis rather than to an attempt by the Commission to find a solution. In that context it was also stated that the topic, although a timely one, seemed to require a choice of modalities and techniques of codification, rather than the elaboration of a specific legal regime. If the aim was to help States achieve a fuller understanding of the problem in order to avoid excessive compartmentalization with the resulting risk of incompatibility between legal regimes, it might be better to organize a seminar on the theme.

380. The view was also expressed that the topic of risks ensuing from the fragmentation of international law was the most interesting one. It would be advisable to give it a title formulated in less negative terms (such as the effect of the diversification of international law), for while a fragmentation of international law linked to the appearance of a host of new actors and the growing number and diversification of existing rules might be fraught with risks, it might equally well afford new opportunities to deal with ostensible conflicts between new and traditional international law, the needs of various groups, the globalization of the economy, the use of new technologies and scientific advances. In fact, the special regimes that worried some were, for the pluralist societies that had emerged in recent years, a means of adjusting to change and of reconciling (national) diversity with (international) uniformity. Admittedly, they entailed risks, but they were an attempt to find answers to the latest dilemmas while at the same time respecting diversity or polycentricity. To international law specialists, the new legal order might seem hazardous, or even a source of disorder, but some delegations considered it to be more attuned to an increasingly complex international situation.

381. In addition to the topics suggested by the Planning Group, a suggestion was made that the Commission should give consideration to the topics "Non-discrimination in international law" and "The precautionary principle". According to the same view, the Commission should not lose sight of the topic "Law of the peaceful settlement of international disputes", which had been removed from the draft articles on State responsibility; the absence of clear rules had given rise to a whole range of ill-coordinated special regimes, thus providing, incidentally, confirmation of the need to study the risks ensuing from the fragmentation of international law.

382. Some delegations also expressed concern at the growing tendency to promote the development of "soft law". While soft law constituted a transitional step between customary law and treaties and made codification possible in many instances, it should not be used as a means of avoiding the adoption of instruments of a binding character. The adoption of declarations or guidelines that were not concretized later in the form of agreements binding on States constituted an unfavourable trend in the codification and progressive development of international law.

383. With regard to the International Law Seminar, a number of delegations expressed support for the programme, which provided fellowships to young lawyers with a view to heightening awareness of, and enthusiasm for, the practice of international law.